91-1497

(1)

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

JIM JOINER; JOHN MILNER

Petitioners,

v.

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

G. DANIEL EVANS
Counsel of Record
1736 Oxmoor Road
Suite 101
Birmingham, Alabama 35209
205/870-1970

GARY P. CODY
MICHAEL J. EVANS
Longshore, Evans & Longshore
1900 City Federal Building
2026 Second Avenue North
Birmingham, Alabama 35203
205/252-7661

Attorneys for Petitioners

98

QUESTION PRESENTED

Whether a municipality's police chief and police sergeant, both of whom had property interests in their employment, were entitled to notice and a hearing prior to the termination of their employment.

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption. The presently listed mayor and council members of the Town of Morris are parties to this action in their official capacities only, as the duly elected representatives of the Town. Under state law they were automatically substituted for the originally-named mayor and council members when the originally-named officials of the Town left office after the commencement, and during the pendency, of the proceedings below. A.1.

This action was instituted against the Town of Morris through the following originally-named elected representatives in their official capacities only: Mayor Lamar Reid and council members Gene Chambers, Ed Reno and Charlie Lollar. The suit against the Town was also originally instituted through council members Earl Peyton and Frank Keith in their official capacities. Peyton and Keith were also sued in their individual capacities, but the petitioners later voluntarily dismissed them in their individual capacities due to their deaths and the petitioners' decision to forego claims against their probate estates.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. Review is Warranted Because Petitioners Were Public Employees, Both of Whom Had a Property Interest in Their Employment, Who Were Discharged by the Town of Morris Without Being Provided a Pretermination Hearing 13

II. Review is Warranted Because the Decision of the Alabama Supreme Court Conflicts With Decisions of This Court on the Issue of Whether Petitioners Were Required to Exhaust Their Administrative Remedies Under State Law Prior to Filing Suit on Their Claims Yhat They Were Entitled to a Pretermination Hearing Under 42 U.S.C. § 1983 24

CONCLUSION 26

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: *Page*

Adler v. Board of Education of City of New York, 342 U.S. 485 (1952) 12, 14, 16, 17

Alabama State Tenure Commission v. Conecuh County, So.2d 1105 (Ala.Civ.App.1985) *cert. quashed* 495 So.2d 1108 (Ala. 1985) 16

Ala. State Tenure Comm'n. v. Mt. Brook Bd. of Ed., So.2d 522 (1977) 16

Armstrong v. Manzo, 380 U.S. 545 (1965) 12, 19

Arnett v. Kennedy, 416 U.S. 134 (1974) 20

Barnett v. Housing Authority of City of Atlanta, 707 F.2d 1571 (7th Cir. 1983) 14

Bell v. Burson, 402 U.S. 535 (1971) 12, 13, 18, 20

Board of Education of Choctaw County v. Kennedy, 55 So.2d 511, 256 Ala. 478 (1951) 15

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 12, 14, 15, 17, 20, 21

Boddie v. Connecticut, 401 U.S. 371 (1971) 12, 13, 18, 20

Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975, modified *en banc*, 545 F.2d 565 (1976), *cert. den.* 435 U.S. 932 (1978) 11, 23

Brown v. Georgia Dept. of Revenue, 881 F.2d 1018 (11th Cir. 1989) 14

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 20

Carey v. Piphus, 435 U.S. 237 (1978) 20

Chevron Oil Company v. Huson, 404 U.S. 97 (1971) 21

City of Huntsville v. Biles, 489 So.2d 509 (Ala. 1986) 14, 15

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 11, 12, 19, 20, 21

Connell v. Higginbotham, 403 U.S. 207 (1971) 12, 14, 16, 17

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Davis v. Scherer, 468 U.S. 183 (1984) 19

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 22

Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987) 14, 15

Fuentes v. Shevin, 407 U.S. 67 (1972) 12, 18

Fusari v. Steinberg, 419 U.S. 379 (1975) 20

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 12, 20

Gibson v. Berryhill, 411 U.S. 564 (1973) 25

Godwin v. City Council of the City of McKenzie, 449 So.2d 1231 (Ala. 1984) 3, 14

Goldberg v. Kelly, 397 U.S. 254 (1970) 12, 18, 20

Goss v. Lopez, 419 U.S. 565 (1975) 12, 18, 20

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Greenfield, M.D. v. Hamrick, 341 So.2d 136 (Ala. 1976) 15

Johnson v. Alabama Agr. and Mechanical University, 481 So.2d 336 (Ala. 1985) 14, 16

Jones v. Preuit & Mauldin, 876 F.2d 1480 (11th Cir. 1989) 21

Katz v. Alabama State Bd. of Medical Examiners, 351 So.2d 890 (Ala. 1977) 15

Lefkowitz v. Turley, 414 U.S. 70 (1973) 19, 20

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 10, 11, 12, 13, 19, 20

Mathews v. Eldridge, 424 U.S. 319 (1976) 20

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 12, 18, 20

McNeese v. Board of Education, 373 U.S. 668 (1963) 25

Miller v. Alabama State Tenure Comm'n, 451 So.2d 301 (Ala.Civ.App. 1984) *cert. den.* 83-723 (Ala. 1984) 16

Mitchum v. Foster, 407 U.S. 225 (1972) 25

Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) 22

Monroe v. Pape, 365 U.S. 167 (1961) 25

Morrissey v. Brewer, 408 U.S. 471 (1972) 20

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Mullane v. Central Hanover B. & T. Co., 339 U.S. 306 (1950) 12, 18, 20

North American Cold Storage Co. v. City of Chicago, 212 U.S. 306 (1908) 10, 11, 22

Opp Cotton Mills v. Admin'r Wage & Hour Div. of Dept. of Labor, 312 U.S. 126 (1941) 19

Owen v. City of Independence, Mo., 445 U.S. 622 (1980) 21

Parratt v. Taylor, 451 U.S 527 (1981) 10, 11, 17, 23

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 24, 25

Paul v. Davis, 424 U.S. 693 (1976) 20

Perry v. Sindermann, 408 U.S. 593 (1972) 12, 14, 17, 18, 20, 21

Reagan v. United States, 408 U.S. 564 (1972) 20

Roberts v. Joiner, 590 So.2d 195 (Ala. 1991) 1, 2, 21

Slochower v. Board of Higher Ed. of City of N.Y., 350 U.S. 551 (1956) 12, 14, 16, 17

Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 339 (1969) 12, 18, 20

State v. Board of Education of Fairfield, 40 So.2d 689, 252 Ala. 254 (1949) 15

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

State Tenure Com'n v. Madison County Bd. of Education, 213 So.2d 823 (1968) 15

Vitek v. Jones, 445 U.S. 480 (1980) 20

Wieman v. Updegraff, 344 U.S. 183 (1953) 17

Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982) 22

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 12, 18, 22

Federal Constitution and Statutes:

U.S. Const. Art. VI, cl. 2 2

U.S. Const. amend. I 2, 7, 9, 10, 16, 21

U.S. Const. amend. XIV 2, 9, 12, 17, 19, 21, 26

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 ..... iii, 2, 9, 12, 24, 25

Ala. Code § 11-43-160 (1975) 2, 3, 14

IN THE

Supreme Court Of The United States

October Term, 1991

No. _____

JIM JOINER; JOHN MILNER

Petitioners,

v.

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioners, Jim Joiner and John Milner, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court issued on September 6, 1991. That decision became final, for purpose of review by this Court, on November 8, 1991 when the Supreme Court of Alabama denied, without opinion, Petitioners' application for rehearing.

OPINIONS BELOW

The September 6, 1991 opinion of the Alabama Supreme Court is reported at 590 So.2d 195 (Ala. 1991), and is re-

printed at A.1-19. The November 8, 1991 decision of the Alabama Supreme Court denying, without opinion, the petitioners' application for rehearing is also reported at 590 So.2d 195 (Ala. 1991). A.1. The November 16, 1990 order of the Trial Court, entering judgment on behalf of the petitioners, is not reported and is reprinted at A.20-25.

JURISDICTION

The decision of the Alabama Supreme Court issued on September 6, 1991 became final, for purpose of review by this Court, on November 8, 1991 when the Alabama Supreme Court denied, without opinion, the petitioners' application for rehearing. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The petitioners' application to extend the time for filing their petition for writ of certiorari was received by this Court on January 28, 1992. The addendum to the petitioners' application was received by the Court on January 30, 1992. On February 4, 1992 the Court extended the time for filing the petition for writ of certiorari to, and including, March 12, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). A.57.

STATUTES INVOLVED

This case involves U.S. Const. Art. VI cl. 2, U.S. Const. amend. I, U.S. Const. amend. XIV, 42 U.S.C. § 1983 and *Ala. Code* § 11-43-160. Pertinent portions of these provisions are reprinted at A.58-62.

STATEMENT OF THE CASE

This case provides the Court with the important opportunity of prohibiting the state from taking the petitioners' vested public employment as police officers without first providing them notice of the charges against them and a hearing on the charges. This case further provides the Court with the opportunity to set right an egregious wrong by restoring to

petitioner Milner, a 53 year-old combat veteran, his career as a police officer, which he will otherwise lose forever.[1] And, finally, this case provides the Court with the important and broader opportunity of protecting all of the public employees in Alabama from having their jobs taken by the state without first being provided notice of charges and a hearing on the charges. The Court can accomplish these ends by reversing the decision of the Alabama Supreme Court, which diametrically conflicts with this Court's longstanding decisions holding that a state is required to provide a tenured public employee with notice of charges being brought against him and a hearing on those charges before the state takes his job.

Petitioner Joiner was hired as police chief of the Town of Morris on August 10, 1978. Under Alabama law, Joiner could be discharged only for cause and only after being provided a hearing by the Town's council.[2]

Petitioner Milner was hired by the Town as a police sergeant in 1982. Milner was hired under the Town's written personnel policy, which is reprinted at A.39-50. The personnel policy stated that new employees would serve a six-month probationary period. A.51. Under the personnel policy, em-

---

[1] Due to his termination by the Town of Morris petitioner Milner was unable to obtain work as a police officer with other municipalities. After Milner began his career as a police officer, the State of Alabama enacted legislation prohibiting the hiring of police officers who have not successfully completed a course of training at Alabama's police academy. Police officers who were employed at the time the statute was enacted were "grandfathered" under the act and were permitted to continue their employment. Because Milner is 53 years old, he is prohibited from enrolling in the State of Alabama's police academy. If this Court rules that petitioner Milner was entitled to receive a pretermination hearing, then under the trial court's order Milner will be reinstated to his former position as police sergeant with the Town of Morris. As an active, employed police officer he will then be eligible for employment as a police officer throughout the State of Alabama, without having to complete the state's police certification course.

[2] *See Ala. Code* § 11-43-160 (1975). A.61.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).

ployees attained "permanent employee" status after satisfactorily serving the probationary period. A.51-52. Permanent employees could be fired only for cause. The personnel policy provided a permanent employee with the "right to hold [his or her] job permanently, conditioned upon [his or her] continued satisfactory performance, honesty, loyalty, and the Town's ability to finance services. . . ." A.51-52. Milner successfully completed his probationary period and attained "permanent employee" status, whereupon he was promoted from patrolman to sergeant.

In October of 1983 the Town clerk showed petitioner Milner several invoices from the Goodyear tire store in Birmingham, Alabama.[3] Those invoices showed that council members Earl Peyton and Frank Keith, as well as Keith's son, had purchased tires for their personal vehicles under the guise of buying tires for the Town of Morris. By purchasing the tires in the name of the Town, they were able to buy the tires at the substantially discounted price that was available to state and local governmental agencies through the state bid law. A.1-2. By purchasing the tires in the name of the Town, Peyton and the Keiths were also able to avoid paying state and federal taxes on the tires. The net result was that council members Peyton and Keith, as well as Keith's son, Bobby, were able to buy their $170.00 tires for approximately $40.00.

Petitioner Milner asked the Town clerk to make copies of the tire invoices, which he then turned over to his immediate

---

[3] Photocopies of the five tire invoices were attached as Exhibit A to the petitioners' original complaint. The five photocopies were identified as plaintiffs' (petitioners') exhibits one through five at trial, and were admitted into evidence. The petitioners did not have the original tire invoices, and their photocopies of the invoices were of very poor quality. Due to the poor quality of the photocopies, they were not able to be adequately reproduced and reprinted for inclusion in the Appendix hereto. Based upon the testimony at trial, the photocopies of the five tire invoices established that council members Peyton and Keith, and Keith's son, Bobby, had purchased tires through the Town's account for their personal use.

supervisor, petitioner Joiner. Joiner took the tire invoices and reported the matter to the mayor, Lamar Reid. A.1-2. Mayor Reid indicated to Joiner that he planned to ask Peyton and Keith to resign from the council.

A private meeting of the Town council was held on December 18, 1983 to resolve the tire issue. At that meeting it was agreed that council members Peyton and Keith would resign from the committee that purchased goods for the Town, and that they would pay the difference between the price that they actually paid for the tires and the price that they would have paid if they had not bought the tires in the name of the Town. A.2, 33.

Following the December 18, 1983 private meeting of the Town council, the mayor called Milner in and told him that the tire matter was over. Later that day, however, council member Keith told Milner that the tire matter was not over, that he was not through with Milner and that things were going to be a lot different regarding the police department. Keith said that he planned to take a much larger hand in running the police department than he ever had before. A.27.

A few minutes after Keith delivered his warning to Milner, council member Peyton came to Milner and said that the situation caused by the tire matter was not resolved, regardless of what the mayor had told Milner. Peyton also said that he was going to "get" Joiner and Milner. A.27.

Shortly before January 1, 1984, council member Keith ordered Joiner to find a reason to terminate petitioner Milner. Joiner refused, saying that Milner had not violated the personnel policy nor committed any wrongdoing that would justify terminating him. A.2.

At the next meeting of the Town council on January 10, 1984, Keith made a motion to cut the pay of the Town's full-time employees by five percent. A.2, 35. The Town's only full-time employees were petitioners Joiner and Milner, police officer Frankie Witt and the Town clerk, Anna Grooms. A.2. Anna Grooms was the person who originally brought the im-

proper tire purchases to the attention of petitioner Milner. A.2. The Town also had part-time employees, but Keith did not seek to cut their pay. A.35. Council members Keith, Peyton, Reno and Chambers voted in favor of the pay cut. A.35. Mayor Reid voted against the pay cut. A.35. Petitioners Joiner and Milner were given no notice prior to the meeting that the council would consider a pay cut.

The reason given by the council for the pay cuts at the January 10, 1984 meeting was the Town's purported poor financial condition. A.2. Mayor Reid later admitted, however, that the Town was in good financial condition at the time the petitioners' pay was cut. Joiner later informed the council that he thought the pay had been cut because he and Milner had reported the improper tire purchases. A.2. Mayor Reid testified at trial that he believed that Joiner's and Milner's pay was cut in retaliation for their speaking out about the tire purchases.

At a council meeting on February 28, 1984, the council decided that the Town should not be paying the health insurance premiums on Joiner's family. A.2-3, 38-39. Prior to the meeting Joiner was given no notice that the council would be considering whether to pay the insurance premiums. Joiner let the council know that he believed the action had been taken in retaliation for his reporting of the improper tire purchases. A.2-3.

At its meeting on March 13, 1984, the Town council adopted a resolution stating that there was "a problem" existing between the council and the police department. A.3. The resolution stated that the council would allow two weeks to find a solution to "the problems" and then, if no solution was found, the council would "bring its own solution to the table." A.3. The mayor said that the council was publicly recognizing that there was a "problem" between the Town council and the police department, and that the council was willing to meet with the police department during the next two weeks to see if the "problems" could be resolved. A.3. Petitioner Milner

asked the mayor to explain the resolution, but neither the mayor nor the members of the council would explain what "problem" they were referring to in the resolution.

On March 15, 1984, petitioners Joiner and Milner met informally with the mayor and members of the council. A.3. Joiner asked for the pay cut to be rescinded. A.3. He also requested that the Town reinstate the health insurance for his family. A.3. The mayor and members of the council did not agree to these requests. A.3.

On March 23, 1984 the complaint initiating this action was filed. A.3. The complaint, with Exhibits B through D, is reprinted at A.26-39.[4] The complaint alleged that Joiner's and Milner's pay had been cut and that Joiner's family health insurance had been terminated in retaliation for reporting the improper tire purchases to the mayor. A.30. The complaint alleged that the actions of the defendants deprived Joiner and Milner of their property without due process of law and infringed upon Joiner's and Milner's right to free speech under the First Amendment to the Constitution of the United States. A.30. The complaint also asserted causes of action under state law. A.30-31.

The next regularly scheduled meeting of the Town council was held on March 27, 1984. At that meeting the council chamber was full of residents of the Town who were there to express their support for the police officers. Instead of discussing the purported police "problems" in the presence of the residents, the council voted to have a closed meeting immediately following the regularly scheduled meeting. The minutes of the closed meeting reflect that the Town's attorney recommended that the council try to find out how the residents of the Town felt about the matter. The Town's attorney also recommended that petitioners Joiner and Milner be suspended with pay for thirty days. No official action was taken.

---

[4] See n.3 *supra* regarding the explanation for omission from Appendix of Exhibit A to the petitioners' original complaint.

Two days later, on March 29, 1984, the plaintiffs were fired at a specially called council meeting. A.4, 40. None of the council members notified petitioners Joiner and Milner of the specially called council meeting. Joiner learned of the meeting when he saw Anna Grooms, the Town clerk, crying at Town Hall on March 29. Joiner asked Ms. Grooms why she was crying, whereupon she told him that there was a council meeting that night and that the council was going to fire him. Milner learned about the council meeting when Joiner telephoned him and told him what he had learned from Anna Grooms. The phone call from Joiner was the only notification to Milner that there was going to be a specially called council meeting on the night of March 29, 1984.

When Joiner arrived at the council chamber on the night of the 29th he noticed that it was filled with relatives of the council members. When the meeting started, the mayor read a statement saying that the unspecified "problems" were still existing with the police department, but he did not say what the "problems" were. A.4. The mayor then said he would like to give Joiner and Milner an opportunity to resign. A.4. After the mayor had read the statement, Joiner told the mayor that he would like to know what the charges against him were. The mayor's response was "Well, there aren't any really." Joiner then said that he had done nothing wrong and would not resign. A.4. The council then allowed comments from residents and relatives of council members Keith and Peyton.[5] The mayor and members of the council then voted to fire petitioners Joiner and Milner, effective immediately. A.4, 40. Council members Keith and Peyton, who had purchased tires through the Town's account, participated in all of the meetings and in all of the discussions leading up to the council's vote to fire Joiner and Milner, but abstained from the actual vote to fire Joiner and Milner. A.4. Mayor Reid testified at trial

---

[5] Council members Peyton and Keith had made the improper tire purchases.

that he had made up his mind to fire the petitioners sometime prior to the March 29th council meeting.

On April 27, 1984, the petitioners filed their Supplemental Complaint, alleging that they had been discharged by the Town in retaliation for their statements concerning the improper tire purchases by council members Peyton and Keith. The Supplemental Complaint is reprinted at A.40-41. The Supplemental Complaint alleged that the discharge was in violation of petitioners' rights under the First Amendment of the Federal Constitution. A.40.

On December 5, 1984, the petitioners filed their Amended Complaint, alleging that they were "permanent employees" of, and had employment contracts with, the Town of Morris under the Town's personnel policy. A.42, 51-52. The petitioners also alleged, among other things, that the Town's failure to provide them notice and a hearing prior to being discharged was a violation of their rights of due process under the Fourteenth Amendment of the Federal Constitution, and that the violation gave rise to a cause of action under 42 U.S.C. § 1983. A.42-43. The Amended Complaint is reprinted at A.42-44. The Town's Personnel Policy is reprinted at A.45-56.

At trial, petitioners dismissed their state law claims and proceeded only on their claims under 42 U.S.C. § 1983. A.4. In addition to petitioners' claims under the First Amendment, the trial court submitted the petitioners' Fourteenth Amendment claims to the jury on three theories: (1) that the pay cut was a deprivation of property without due process of law; (2) that the refusal to pay Joiner's family health insurance premiums was a deprivation of property without due process of law; and (3) that petitioners' employment was terminated without due process of law. A.4, 20-25. The due process claims were based upon the Town's failure to provide petitioners with notice of charges and a hearing on those charges before cutting petitioners' pay, eliminating Joiner's family health insurance, and terminating petitioners' employment. A.20-22. The

jury returned a general verdict in favor of petitioners, awarding them each $100,000. A.1, 23. The trial court awarded Joiner an additional $25,430 for lost wages and insurance premiums, and Milner an additional $39,034 for lost wages. A.1, 23. The trial court also order the Town to reinstate petitioner Milner. A.1, 23.[6]

On appeal by the Town, the Alabama Supreme Court held that the petitioners' speech concerning the improper tire purchases was protected under the First Amendment and that there was "substantial evidence" that the Town council discharged the petitioners in retaliation for reporting the improper tire purchases to the mayor. A.12-13. The court also found "substantial evidence" that the Town had cut the petitioners' pay and terminated Joiner's family insurance for the same retaliatory purpose. A.12-13. The court held, however, that the trial court had erred in submitting to the jury the claim that petitioners were terminated without due process of law. A.11, 14. This holding was based upon the court's opinion that, at the time petitioners were fired, posttermination remedies provided all the process petitioners were due with regard to the termination of their employment. A.4-5, 8, 11.

REASONS FOR GRANTING THE WRIT

In reversing the jury verdict and decision of the trial court, the Alabama Supreme Court held that the petitioners were not entitled to receive a pretermination hearing. A.4-5, 8, 11. The only decisions of this Court cited by the Alabama Supreme Court in holding that Joiner and Milner were not entitled to a pretermination hearing were *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *Parratt v. Taylor*, 451 U.S. 527 (1981), and *North American Cold Storage Co. v. City of Chicago*,

---

[6] Petitioner Joiner dismissed his claim for reinstatement as police chief of the Town of Morris due to a work-related injury he suffered on another job after being terminated by the Town. As a result of the injury, Mr. Joiner became totally and permanently disabled.

212 U.S. 306 (1908) A.4-11. The Alabama Supreme Court also emphasized this Court's citation of *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), modified *en banc*, 545 F.2d 565 (1976), in *Parratt*. A.7-8. The Alabama Supreme Court decided that a city's summary seizing of rotten food, *North American*, a prison guard's unintentional loss of a prisoner's hobby kit, *Parratt*, and the temporary loss of a prisoner's trial transcript due to a prison guard unintentionally leaving the prisoner's cell door open, *Bonner*, were deprivations of property equivalent to the Town council's intentional and retaliatory taking of the petitioners' tenured jobs without providing them a pretermination hearing. A.11.

The Alabama Supreme Court ruled that this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) did not apply because ". . . [petitioners] are challenging the town council's *actions, not an established state procedure*, so *Parratt* is more apposite than *Logan*." (emphasis added). A.10-11. The court further determined that, after the March 29, 1984 termination of the petitioners, this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) appeared to hold for the first time that postdeprivation remedies may not satisfy due process. A.5. The Alabama Supreme Court implied that it might have decided the petitioners' case differently under *Loudermill*, but ". . . the [petitioners did] not present an argument that we should retroactively apply *Loudermill* . . . and we are not inclined to do so without such an argument." A.5.

The complainant in *Loudermill* was discharged on November 3, 1980 without being provided a pretermination hearing, *Loudermill*, at 535-536; petitioners in the case at bar were discharged without a pretermination hearing on March 29, 1984. A.2, 40, 42-43. The Alabama Supreme Court, however, ignored the fact that this Court held that the complainant in *Loudermill* was entitled to a pretermination hearing at the time of his termination on November 3, 1980. A.5. The Alabama Supreme Court also ignored the specific citation of *Loudermill* on page 28 of the petitioners' brief on appeal and

on pages 14-19 in petitioners' application for rehearing to the court. A.5.

The decision of the Alabama Supreme Court conflicts with this Court's long line of decisions on the process due an individual prior to the state depriving the individual of his tenured public employment or other important property interests. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Slochower v. Board of Higher Ed. of City of N.Y.*, 350 U.S. 551 (1956); *Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952); *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306 (1950); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Goss v. Lopez*, 419 U.S. 565 (1975); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 339 (1969); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

In ruling that the petitioners were not entitled to receive a pretermination hearing, the Alabama Supreme Court has severely restricted the due process protections guaranteed to the petitioners and other tenured public employees in Alabama under the Fourteenth Amendment and 42 U.S.C. § 1983. The court's decision has also removed an essential barrier of protection between all Alabama citizens with important property interests and state actions taken against those interests. The Alabama Supreme Court has, without sound legal basis, substituted its restrictive interpretation of due process for the much broader boundaries which have been clearly defined in the decisions of this Court.

If the decision of the Alabama Supreme Court is allowed to stand, then the state of Alabama and its local governments will be empowered to discharge any tenured public employee

without providing the employee a pretermination hearing on the charges against him. The state and its local governments will be further empowered to deprive any Alabama citizen of his property interests without first providing him notice and a hearing on the reasons for the deprivation.

I.

REVIEW IS WARRANTED BECAUSE PETITIONERS WERE PUBLIC EMPLOYEES, BOTH OF WHOM HAD A PROPERTY INTEREST IN THEIR EMPLOYMENT, WHO WERE DISCHARGED BY THE TOWN OF MORRIS WITHOUT BEING PROVIDED A PRETERMINATION HEARING

In 1971, twenty-three years prior to the Town's summary discharge of the petitioners, this Court stated that the ". . . root requirement [of due process is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. . . ." *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971) (emphasis in original). A few months after the decision in *Boddie*, this Court emphasized the predeprivation requirements of due process, stating that ". . . it is fundamental that except in emergency situations . . . due process requires . . . 'notice and opportunity for hearing' . . . *before* the termination [of the property interest] becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971) (emphasis in original). This Court further underlined the fundamental principle of due process, stating: "[t]o put it as plainly as possible, the State may not finally destroy a property interest without *first* giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (emphasis added).

This Court has long held that public employees, particularly those with property interests in their continued employment, are entitled to receive notice of adverse employment

charges brought against them and a hearing on those charges prior to being discharged. *See Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952); *Slochower v. Board of Higher Ed. of City of N.Y.*, 350 U.S. 551 (1956); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

A public employee who may be discharged only for cause is deemed to have a property interest in his employment, and must be afforded notice and a hearing before being discharged. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570, 576-578 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599, 601 (1972); *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).[7] When a police officer can be discharged only for cause, and it is practicable for the state to provide a pretermination hearing, due process requires that the officer be given notice and a hearing before being discharged. *Fetner v. City of Roanoke*, 813 F.2d 1183, 1185-86 n.7 (11th Cir. 1987), *citing Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Bell v. Burson*, 402 U.S. 535 (1971).

Under Alabama law, as police chief of the Town of Morris petitioner Joiner could be discharged only for cause and only *after* being provided a hearing by the council of the Town of Morris. *Ala. Code* § 11-43-160 (1975). A.62.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).[8] Joiner, therefore, had a property interest in his con-

---

[7] *See also Johnson v. Alabama Agricultural and Mechanical University*, 481 So.2d 336, 338 (Ala. 1985); *City of Huntsville v. Biles*, 489 So.2d 509, 512 (Ala. 1986); *Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018, 1024-27 (11th Cir. 1989); *Barnett v. Housing Authority of City of Atlanta*, 707 F.2d 1571, 1576-77 (11th Cir. 1983).

[8] On March 2, 1984 the Alabama Supreme Court held that a city's police chief ". . . could be discharged only *after* a 'for cause' hearing by the City Council, as provided by § 11-43-160." *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984) (emphasis added). The court decided *Godwin* almost a month prior to the time that the Town of Morris discharged the petitioners without provided them a pretermination hearing.

tinued public employment and was entitled to receive a pretermination hearing. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570, 576-578 (1972); *Fetner v. City of Roanoke*, 813 F.2d 1183, 1185-86 n.7 (11th Cir. 1987); *City of Huntsville v. Biles*, 489 So.2d 509, 511-512 (Ala. 1986).

Petitioner Milner was a "permanent status" police officer, as defined by the Town's personnel policy, who had "*a right to hold [his] job permanently*, conditioned upon [his] continued satisfactory performance, honest, loyalty and the Town's ability to finance services. . . ." (emphasis added). A.51-52. Milner could be fired only for cause and, therefore, had a property interest in his continued public employment which entitled him to receive a pretermination hearing. A.51-52. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570, 576-578 (1972); *Fetner v. City of Roanoke*, 813 F.2d 1183, 1185-86 n.7 (11th Cir. 1987); *City of Huntsville v. Biles*, 489 So.2d 509 (Ala. 1986).

Prior to its holding that the petitioners were not entitled to a pretermination hearing, the Alabama Supreme Court issued numerous opinions holding that notice and a hearing were required before the state could deprive an individual of his tenured public employment or other means of earning a living. *See State v. Board of Education of Fairfield*, 40 So.2d 689, 252 Ala. 254 (1949) (tenured public school teacher was entitled to notice and a hearing before cancellation of her teaching contract); *Board of Education of Choctaw County v. Kennedy*, 55 So.2d 511, 256 Ala. 478 (1951) (contract of tenured public school teacher could not be cancelled until a hearing was held); *State Tenure Com'n v. Madison County Bd. of Education*, 213 So.2d 823 (1968) (tenured public school teacher was entitled to, and did receive, hearing prior to the cancellation of his teaching contract); *Greenfield, M.D. v. Hamrick*, 341 So.2d 136 (Ala. 1976) (revocation or suspension of a physician's license to practice medicine without prior notice and a hearing is unconstitutional); *Katz v. Alabama State Bd. of Medical Examiners*, 351 So.2d 890 (Ala. 1977) (a "full due process hearing" is

required prior to denying reinstatement of physician's license to practice medicine).[9]

This Court has long held that an individual with a property interest in his employment is entitled to receive notice of charges against him and a hearing on the charges prior to being discharged. In *Slochower v. Board of Higher Ed. of City of N.Y.*, 350 U.S. 551 (1956), this Court ruled that the due process rights of a tenured city college teacher were violated when the Board of Education of the City of New York from summarily discharged him. The sole basis for the discharge was the fact that the teacher, in testifying before a congressional committee, had exercised his right against self-incrimination under the Fifth Amendment. Under the state's tenure law, the teacher could be discharged ". . . only for cause and *after* notice, hearing, and appeal." *Id.* at 554. (emphasis added.)

In *Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952), this Court found that the firing of public school employees did not violate the employees' rights of speech and assembly under the First Amendment, because they were provided with notice of the charges against them and a hearing before being discharged. *Id.* at 490-491, 493.

In *Connell v. Higginbotham*, 403 U.S. 207 (1971), a public school teacher, who had been employed only 49 days, was summarily discharged when she refused to sign the state's loyalty oath. The Court held that the discharge fell ". . . within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process." *Id.* at 208-209, *citing Slochower v. Board of Higher Ed. of City of N.Y.*, 350 U.S. 551 (1956).

---

[9] *See also Ala. State Tenure Comm'n. v. Mt. Brook Bd. of Ed.*, 348 So.2d 522 (1977); *Miller v. Alabama State Tenure Comm'n*, 451 So.2d 301 (Ala.Civ.App. 1984) *cert. den.* 88-723 (Ala. 1984); *Ala. State Tenure Comm'n. v. Conecuh County*, 495 So.2d 1105 (Ala.Civ.App. 1985) *cert. quashed* 495 So.2d 1108 (Ala. 1985); *Johnson v. Ala. Agr. & Mechanical University*, 481 So.2d 336 (Ala. 1985).

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court stated the right of tenured public employees to a pretermination hearing, as follows:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount . . .
>
> [I]n the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and college professors and staff members dismissed during the terms of their contracts, *Wieman v. Updegraff, 344 U.S. 183*, 73 S.Ct. 215, 97 L.Ed. 216, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418 . . .

Board of Regents v. Roth at 569-570, 576-577; *See also Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

The Alabama Supreme Court, in effect, has decided in the case at bar that this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981) implicitly overruled this Court's decisions in *Slochower v. Board of Higher Ed. of City of N.Y.*, 350 U.S. 551 (1956), *Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952), *Connell v. Higginbotham*, 403 U.S. 207 (1971), *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v.*

Sindermann, 408 U.S. 593 (1972). A.4-11. The decision of the Alabama Supreme Court, if allowed to stand, denies the petitioners and other tenured public employees in Alabama the benefit of this Court's decisions requiring notice and a pretermination hearing for such employees.

This Court has also clearly recognized that property interests other than tenured public employment are sufficiently important to the individual to require a predeprivation hearing. *See Bell v. Burson*, 402 U.S. 535 (1971) (upon issuance, driver's license may become essential to one's livelihood and, except in an emergency situation, state must provide predeprivation notice and a hearing); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state's refusal to allow impecunious welfare recipients to file divorce suits *in forma pauperis* constituted denial of their right to meaningful opportunity to be heard); *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306 (1950) (trust beneficiaries were entitled to notice and an opportunity to object before being deprived of their small financial trust accounts); *Goss v. Lopez*, 419 U.S. 565 (1975) (public school students were entitled to receive notice and a hearing before being suspended); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 339 (1969) (prejudgment garnishment of wages violates fundamental due process if the wage earner is not provided with notice and a prior hearing); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (notice and a hearing are essential before using state statute to impugn or take a person's good name, reputation, honor or integrity); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process requires a pretermination evidentiary hearing before discontinuing individual's public welfare payments); *Perry v. Sindermann*, 408 U.S. 593 (1972) (nontenured public college professor was entitled to hearing on his claim of *de facto* tenure prior to college's vote not to renew his yearly contract); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin statutes violated due process because they allowed the state to take individual's chattels without first providing a hearing); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (public

utility was required to provide individuals with notice and a pretermination opportunity to show that utility service should not be terminated); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (disabled worker was entitled to receive hearing by state unemployment commission prior to termination of worker's claim by the commission); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (public school security guard was entitled to an opportunity to respond to adverse employment charges before being discharged); *Opp Cotton Mills v. Admin'r Wage & Hour Div. of Dept. of Labor*, 312 U.S. 126 (1941) (due process was satisfied when complainant received notice and an opportunity to be heard prior to Administrator's final order setting wages to be paid by complainant); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (hearing conducted subsequent to adoption proceeding did not afford due process to biological father, who was not notified of the adoption proceeding by the mother and her successor husband). *Cf. Leſkowitz v. Turley*, 414 U.S. 70 (1973); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Contrary to the Alabama Supreme Court's finding that the decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), "seems to have changed" this Court's position regarding the sufficiency of postdeprivation remedies, this Court has consistently held that an individual is entitled to receive notice and a hearing before the state deprives him of his tenured public employment or any other significant property interest.[10] A.5. Except for one case,[11] every case cited by the Court in *Loudermill*, for the proposition that the complain-

---

[10] In its opinion below, the Alabama Supreme Court hinted that a different result might have obtained if the petitioners had been discharged after this Court's decision in *Loudermill*. A.5. The decision below leaves unsettled the question of whether the Alabama Supreme Court will unequivocally acknowledge that, under the Fourteenth Amendment to the Federal Constitution, tenured public employees are entitled to notice and a hearing prior to the state depriving them of their employment or property interests.

[11] As cited in *Loudermill*, *Davis v. Scherer*, 468 U.S. 183 (1984), was decided by this Court on June 28, 1984.

ant was entitled to a pretermination hearing at the time of his discharge on November 3, 1980, was decided by this Court prior to the petitioners' summary discharge on March 29, 1984.[12] It is apparent from the pre-1984 decisions cited in *Loudermill* that this Court's decision in *Loudermill* did not "change its position" on the insufficiency of postdeprivation remedies. The Court confirmed that its decision in *Loudermill* was not a departure from its prior decisions requiring predeprivation hearings, by specifically acknowledging that its ruling was based upon law that had "been settled for some time now." *Loudermill*, at 542.

Because the Court's decision in *Loudermill* did not change its previous decisions regarding the necessity of pretermination hearings, it was unnecessary for this Court to address the issue of retrospective or prospective application of *Loudermill*. There is, therefore, no legal basis for the Alabama Supreme Court's finding that *Loudermill* may have changed the requirements of due process regarding predeprivation hearings, and that *Loudermill* would have to be applied retroactively in order for the petitioners to be entitled to a pretermination hearing. A.5. In a decision very similar to the decision of the Alabama Supreme Court in the case at bar, the 8th Circuit Court of Appeals held that this Court's due process decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) were not

---

[12] *See Loudermill*, citing *Arnett v. Kennedy*, 416 U.S. 134 (1974), *Mathews v. Eldridge*, 424 U.S. 319 (1976), *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Reagan v. United States*, 408 U.S. 564 (1972), *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), *Goss v. Lopez*, 419 U.S. 565 (1975), *Paul v. Davis*, 424 U.S. 693 (1976), *Vitek v. Jones*, 445 U.S. 480 (1980), *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *Morrissey v. Brewer*, 408 U.S. 471 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), *Perry v. Sindermann*, 408 U.S. 593 (1972), *Fusari v. Steinberg*, 419 U.S. 379 (1975), *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Lefkowitz v. Turley*, 414 U.S. 70 (1973), *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *Carey v. Piphus*, 435 U.S. 247 (1978), *Boddie v. Connecticut*, 401 U.S. 371 (1971) and *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

retroactively applicable to a police chief's termination, due to *Roth* and *Perry* being decided by this Court two months after the police chief's termination. This Court specifically rejected the holding of the 8th Circuit Court of Appeals. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 634-635 (1980). There is, therefore, no valid legal basis for the Alabama Supreme Court's determination that *Loudermill* would have to be "retroactively applied" for petitioners to be entitled to a pretermination hearing.[13] A.5. *See also Chevron Oil Company v. Huson*, 404 U.S. 97 (1971); *Jones v. Preuit & Mauldin*, 876 F.2d 1480 (11th Cir. 1989).

The Alabama Supreme Court also based its opinion, in part, upon its determination that the petitioners were challenging the "actions" of the Town council in denying them a pretermination hearing, rather than challenging an "established state procedure." A.11. The court, apparently, gave little or no weight to the fact that the petitioners immediately objected when the Town's council voted to cut their pay, and again when the council voted to terminate Joiner's family insurance. The petitioners further objected when council member Keith began disrupting their work schedules. After trying, without success, to persuade the mayor and council members to reinstate their pay and Joiner's insurance, (A.3.), petitioners filed suit claiming that the Town's actions violated their rights under the First and Fourteenth Amendments of the Federal Constitution. Shortly thereafter, the mayor and council voted to discharge the petitioners and did not provide them a pretermination hearing. A.4, 40, 42-43. At that point, petitioners amended their suit to include their claim that they were denied due process when the Town discharged them without providing them a pretermination hearing. A.42-43.

---

[13] The Alabama Supreme Court also stated that the petitioners did ". . . not present an argument that we should retroactively apply *Loudermill* . . . and we are not inclined to do so without such an argument." *Roberts v. Joiner*, 590 So.2d 195, 198 (1991). A.5. As pointed out at pp. 11-12 *supra*, petitioners cited *Loudermill* on page 28 of their brief on appeal to the Alabama Supreme Court, and again at length on pages 14-19 of their application for rehearing to that court.

On each occasion when the Town deprived the petitioners of their pay, insurance and employment, it did so through the official votes of its council members as the duly elected representatives of the Town. The official "actions" of the council, therefore, in casting those votes constituted the official policy, custom or procedure of the Town. *Williams v. City of Valdosta*, 689 F.2d 964, 969 (11th Cir. 1982), *citing Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Cf. Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) ("It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.")

In defining the fundamental parameters of due process this Court has, of course, recognized the existence of situations where it is neither possible nor safe to require a predeprivation hearing. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), this Court upheld a federal law authorizing the summary seizure of a private company's mislabeled food supplements that were going to be sold to the public, even though the law did not provide the company a pre-seizure hearing. In *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908), the Court upheld a city's seizure and destruction of a private company's rotten or diseased poultry that was going to be sold to the public, even though the municipal ordinance authorizing the city's actions did not provide for any predeprivation notice or hearing. This Court recognized the narrow application of its holding in stating,

> What is the emergency which would render a hearing unnecessary? We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the legislature as to the necessity for a prior hearing. . . .

North American, at 320.

In *Parratt v. Taylor* 451 U.S. 527 (1981), this Court affirmed that its past decisions ". . . mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interest." *Id.* at 540. However, under the unique facts in *Parratt*, the Court found that it would have been impracticable or impossible for the state to provide the complainant a hearing prior to the time that his hobby kit was unintentionally lost by a prison guard. The fact that the prisoner's hobby kit was unintentionally lost precluded foreknowledge and a "pre-losing" hearing on the part of the state.

In *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), modified *en banc*, 545 F.2d 565 (1976), *cert. den.* 435 U.S. 932 (1978), the temporary loss of a prisoner's trial transcript, as a result of a prison guard unintentionally leaving the prisoner's cell door open, did not constitute a taking of the prisoner's property without a pre-taking hearing.

In *Parratt* and *Bonner* the wrongs complained of were unintentional, random, nonrecurring oversights by prison guards which resulted in the loss of a $23.50 hobby kit, *Parratt*, and the temporary loss of a trial transcript, *Bonner*. Yet, the Alabama Supreme Court's decision, that the petitioners were not entitled to a pretermination hearing, was based entirely upon this Court's opinion in *Parratt* and the Court's citation of *Bonner* in *Parratt*.

At the trial of the case at bar, the Town's mayor acknowledged that the petitioners were not notified of the charges being brought against them, and he acknowledged that it would not have been "impracticable or impossible" for the Town to have provided the petitioners a hearing on the charges before terminating them. It is obvious that the decisions in *Parratt* and *Bonner*, which are the basis for the Alabama Supreme Court's decision, (A.4-8), are inapposite to the petitioners' entitlement to a pretermination hearing.

II.

REVIEW IS WARRANTED BECAUSE THE LOWER COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON THE ISSUE OF WHETHER PETITIONERS WERE REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES UNDER STATE LAW PRIOR TO FILING SUIT ON THEIR CLAIMS THAT THEY WERE ENTITLED TO A PRETERMINATION HEARING UNDER 42 U.S.C. § 1983

In holding that the petitioners were not entitled to a pretermination hearing, the Alabama Supreme Court determined that the petitioners should have exhausted their post-termination administrative remedies instead of filing suit under 42 U.S.C. § 1983:

> The evidence also indicates that instead of pursuing the post-termination procedures, the [petitioners] opted to amend their complaint (which had been filed [regarding their pay and insurance cuts] before they were terminated) to use the termination as another theory for recovery on their state law and § 1983 claims.
>
> Considering all the evidence, we hold that the Town did not deprive [petitioners] of property without due process of law in relation to their claims concerning their termination . . .

A.11.

Under this Court's holding in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), petitioners had an absolute right to file suit under 42 U.S.C. § 1983 regarding their claim for a pretermination hearing, without first exhausting their administrative remedies through the post-termination hearing procedures provided by the Town. This Court stated, unequivocally, that:

> When federal claims are premised on [42 U.S.C. § 1983] — as they are here — we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights . . . [T]his Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since McNeese . . .

Patsy, at 500-501 (citations omitted).

See also Monroe v. Pape, 365 U.S. 167 (1961); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Cf. Mitchum v. Foster*, 407 U.S. 225 (1972).

The decision of the Alabama Supreme Court imposes upon the petitioners, and all other citizens of Alabama seeking redress under 42 U.S.C. § 1983, the impermissible requirement of exhaustion of administrative remedies that may be provided by state law or municipal ordinance. This Court should not allow that decision to stand.

CONCLUSION

By reviewing and reversing the decision of the Alabama Supreme Court, this Court has the opportunity to restore the full measure of protection afforded under the due process clause of the Fourteenth Amendment to the petitioners, to all other tenured public employees in Alabama and to all citizens of Alabama who have significant property interests.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

G. DANIEL EVANS
Counsel of Record
1736 Oxmoor Road
Suite 101
Birmingham, Alabama 35209
205/870-1970

GARY P. CODY
MICHAEL J. EVANS
Longshore, Evans & Longshore
1900 City Federal Building
2026 Second Avenue North
Birmingham, Alabama 35203
205/252-7661

Attorneys for Petitioners

APPENDIX

A-1

Jim ROBERTS, et al.

v.

Jim JOINER and John Milner.

1900502.

Supreme Court of Alabama.

Sept. 6, 1991.

Rehearing Denied Nov. 8, 1991.

PER CURIAM.

Jim Joiner and John Milner, who were employed as law enforcement officers by the Town of Morris (the "Town"), filed a 42 U.S.C. § 1983 action against all the members of the town council of Morris, alleging, among other things, that the town council members had reduced their salaries and then had terminated them and in so doing had both deprived them of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, and violated their right to freedom of speech guaranteed by the First Amendment to the United States Constitution. Later, another town council was elected, and the new town council members (Jim Roberts, et al.) were substituted as parties to the action, pursuant to Rule 25(d)(1), A.R.Civ.P. The jury returned a verdict in favor of the plaintiffs in the amount of $100,000 each. The trial court awarded Joiner an additional $25,430 for lost wages and lost insurance premium benefits; awarded Milner an additional $39,034 for lost wages; ordered Milner reinstated; and entered a judgment on the verdict.

In 1983, Joiner was the Town's chief of police and Milner was a sergeant in the police department. In late November or early December, 1983, Joiner and Milner informed the Town's mayor, Lamar Reid, that town council members Earl Peyton and Frank Keith had purchased tires through the Town's ac-

count for their personal use. Peyton and Keith had paid for the tires, but had received them at a substantially discounted price by using the Town's account. Joiner and Milner also notified the State Ethics Commission, and they say that the Ethics Commission told them that it would be best for the Town to handle the situation internally.

On December 8, [sic] 1983, the town council met to address "the tire situation." It determined that Peyton and Keith would resign from the committee that purchased goods for the Town and that they should pay the tire store the amount of the discount they had improperly taken.

On December 27, 1983, the town council voted to borrow $8,500 on a 90-day promissory note to cover payroll expenses.

In early January 1984, Keith, who was the town council member directly supervising the police department, altered Milner and Joiner's work schedules, and the plaintiffs allege that this was the beginning of the retaliation for their telling on Peyton and Keith. Joiner testified that also in early January, Keith told him to find a reason to fire Milner.

On January 10, 1984, Keith made a motion to lay off the police dispatcher, demote a police officer to dispatcher, and cut all regular full-tie employees' salaries by five percent. The town council, citing financial difficulties, approved the motion. The full-time employees were Joiner, Milner, the police officer who was demoted to dispatcher, and the town clerk, who had originally brought the tire purchases to the attention of Milner.

Shortly after that meeting, Joiner told the mayor and a town councilman that the pay cut was in retaliation for his telling on Peyton and Keith about the tire purchases.

On January 28, 1984, the town council met and Joiner read a letter to the council stating that the pay cuts and layoffs were retaliation. Milner attended this meeting.

The town council met again on February 28, 1984. Councilman Chambers questioned the Town's paying insurance for all the members of Joiner's family. The town council

had previously voted not to provide family health insurance for employees hired after January 26, 1982. Joiner had resigned as police chief in February 1982 and then had been rehired in March 1982; accordingly, Chambers argued, Joiner was not entitled to family health insurance. The town council voted to pay only Joiner's health insurance premiums.

Joiner and Milner again complained to the town council that this was retaliation.

Either the last day of February or the first day of March 1984, Joiner moved from Morris to Jasper, Alabama. Joiner testified at trial that his family moved and that his wife got a job because it was apparent to him that he was going to be terminated

Joiner and Milner attended the town council's March 13, 1984, meeting, during which the council approved this resolution:

> "WHEREAS, the Council of the Town of Morris recognizes publicly that there is a problem existing between the Police Dept. and the Council members.
>
> "WHEREAS, the Council wants to try to resolve the problem as it is detrimental to the operation of the Town.
>
> "WHEREAS, the Council is giving two weeks to work the problems out and if a solution cannot be settled on, then the Council will have to resolve the matter at the next Council meeting."

On March 15, 1984, Milner and Joiner met with the town council to try to resolve their difficulties, but both sides were intransigent, the plaintiffs demanding a full reinstatement of benefits and the town council unwilling to reinstate any benefits.

On March 23, 1984, Joiner and Milner filed this action, specifically claiming that their pay had been cut and that insurance for Joiner's family had been terminated in retaliation for their reporting the tire purchases to the mayor. The complaint requested damages under 42 U.S.C. § 1983 for alleged

violations of the plaintiffs' rights to free speech and due process, and requested damages based on state law claims for breach of contract, "bad faith," outrage, and intentional infliction of emotion distress.

On March 29, 1984, the town council met again. The mayor stated alleged reasons for the town council's dissatisfaction with the plaintiffs' work and asked them to resign. They were at the meeting and refused to resign; the town council voted to terminate them. Keith and Peyton did not vote.

The plaintiffs amended their complaint to claim additionally that they had been terminated without due process and in violation of their right to free speech.

At trial, the plaintiffs dropped the state law claims and proceeded only on their § 1983 action. In addition to their free speech claims, the trial court allowed the plaintiffs' claim concerning deprivation of property without due process to go to the jury on at least three theories: 1) that the pay cut was a deprivation without due process, 2) that the reduction of Joiner's family insurance benefits was a deprivation without due process, and 3) that the plaintiffs were terminated without due process. The jury returned a general verdict.

For the plaintiffs to recover for the alleged deprivation of their property rights without due process of law, they must prove both 1) that they had a property interest and 2) that they were deprived of that interest without due process of law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). For the sake of discussion only, we assume that they had a property interest and resolve the case by addressing whether they were deprived of such an interest without due process of law. Specifically, we address the plaintiffs' claims that they were terminated without due process.

In relation to that claim, the plaintiffs argue that they were entitled to receive notice of the charges against them and were entitled to a hearing prior to their termination. However, as

we later explain in more detail, according to United States Supreme Court decisions in *Parratt* and *Logan*, which had been decided at the time of the transactions underlying this lawsuit, even in the absence of pretermination procedures, posttermination remedies can properly provide due process under the United States Constitution in relation to Joiner and Milner's claim that the town council itself deprived them of property without due process — although if their claim had been based on a state-established ordinance or statute that purportedly denied them due process, such postdeprivation remedies might have been insufficient.

Since the transactions occurred, the United States Supreme Court's position on whether postdeprivation remedies sufficiently provide due process seems to have changed. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The plaintiffs do not present an argument that we should retroactively apply *Loudermill*, however, and we are not inclined to do so without such an argument. See *Cox v. Cook*, 420 U.S. 734, 95 S.Ct. 1237, 43 L.Ed.2d 587 (1975); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (19871).

In *Parratt*, an inmate in a Nebraska correctional facility ordered through the mail certain hobby materials. When they arrived, he was in solitary confinement, where he was not permitted to have the materials, and when he was released from solitary confinement, the materials had been lost. He brought a 42 U.S.C. § 1983 action, alleging deprivation of property without due process of law. The United States Supreme Court wrote:

> "Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process.

"This Court has never directly addressed the question of what process is due a person when an employee of a State negligently take his property. In some cases this Court has held that due process requires a predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases, however, the deprivation of property was pursuant to some established state procedure and 'process' could be offered before any actual deprivation took place. For example, in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the Court struck down on due process grounds a New York statute that allowed a trust company, when it sought a judicial settlement of its trust accounts, to give notice by publication to all beneficiaries even if the whereabouts of the beneficiaries were known. The Court held that personal notice in such situations was required and stated that 'when notice is a person's due, process which is a mere gesture is not due process.' . . . [Here the Court cited several cases dealing with predeprivation notice.] In all these cases, deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur.

"We have, however, recognized that post-deprivation remedies made available by the State can satisfy the Due Process Clause. In such cases, the normal predeprivation notice and opportunity to be heard is pretermitted if the State provides a postdeprivation remedy. In *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908), we upheld the right of a State to seize and destroy unwholesome food without a preseizure hearing. The possibility of erroneous destruction of property outweighed by the fact that the public health emergency justified immediate action and the owner of the

property could recover his damages in an action at law after the incident. . . .

". . . .

"Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). However, as many of the above cases recognize, we have rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property. . . .

". . . .

"[The Court quoted with approval the following statements from *Bonner v. Coughlin,* 517 F.2d 1311, 1319 (7th Cir. 1975), modified en banc, 545 F.2d 565 (1976)]:

"'It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against 'State' deprivations of property; in the later situation, however, even though there is action 'under color of' state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the

> conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.' "

451 U.S. at 537-42, 101 S.Ct. at 1914-16 (emphasis original).

Accordingly, *Parratt* seems to indicate that Joiner and Milner were not necessarily entitled to predeprivation proceedings, because they are challenging actions by town council members instead of established state procedures. *Parratt* also seems to indicate that postdeprivation proceedings in this situation can properly provide due process.

In *Logan,* the plaintiff challenged established state procedures. Logan was discharged from Zimmerman Brush Company purportedly because he had a physical handicap that rendered him incapable of working. Logan challenged that discharge under the Illinois Fair Employment Practices Act. The United States Supreme Court described the events following Logan's challenge:

> "[Logan's filing of a charge with the Illinois Fair Employment Practices Commission] triggered the Commission's statutory obligation under ¶ 858(b) to convene a factfinding conference within 120 days; in Logan's case, this meant by March 13, 1980. Apparently through inadvertence, the Commission's representative scheduled the conference for March 18, five days after expiration of the statutory period. Notice of the meeting, which was mailed to both parties in January 1980, specified the hearing's date and location and declared that attendance was 'required.' It, however, did not allude to the FEPA's 120-day time limit. The Commission also asked the company to complete a short questionnaire concerning its employment practices, and directed that it submit its answers by March 10. The company did this without objection.
>
> "When the conference date arrived, the company moved that Logan's charge be dismissed because the

> Commission had failed to hold the conference within the statutorily-mandated 120-day period. This request was rejected. The company thereupon petitioned the Supreme Court of Illinois for an original writ of prohibition. That court stayed proceedings on Logan's complaint pending decision on the request for a writ. . . .
>
> "Before the Illinois Supreme Court, Logan argued that terminating his claim because of the Commission's failure to convene a timely conference — a matter beyond Logan's, or indeed the company's, control — would violate his federal rights to due process and equal protection of the laws. But the court noted that the statutory provision at issue, ¶ 858(b), declared: 'Within 120 days of the proper filing of a charge, the Commission *shall* convene a fact finding conference. . . .' (Emphasis added [in *Logan*].) The Illinois court found this legislative language to be mandatory, and accordingly it held that failure to comply deprived the Commission of jurisdiction to consider Logan's charge.
>
> "The Illinois Supreme Court summarily rejected Logan's argument that his due process and equal protection rights would be violated were the Commission's errors allowed to extinguish his cause of action.

455 U.S. at 426-27, 102 S.Ct. at 1152-53 (citations omitted).

Addressing Logan's alleged deprivation of due process, the Supreme Court wrote:

> "To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.
>
> "On the other hand, the Court has acknowledged that the timing and nature of the required hearing 'will depend on appropriate accommodations of the competing interests involved.' *Goss v. Lopez*, 419 U.S. [565], at 579 [95 S.Ct. 729, at 738, 33 L.Ed.2d 548].

These include the importance of the private interest and the length or finality of the deprivation, see *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. [1], at 19 [98 S.Ct. 1554, at 1565, 56 L.Ed.2d 30]; *Mathews v. Eldridge,* 424 U.S. [319], at 334-335 [96 S.Ct. 893, at 902-903, 47 L.Ed.2d 18]; the likelihood of governmental error, see *id.,* at 335 [96 S.Ct. at 903]; and the magnitude of the governmental interests involved, see *ibid,,* and *Wolff v. McDonnell,* 418 U.S. [539], at 561-563 [94 S.Ct. 2963, at 2977, 41 L.Ed.2d 935].

"Each of these factors leads us to conclude that appellant Logan is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. . . .

". . . .

"Despite appellee Zimmerman Brush Company's arguments, the recent decision in *Parratt v. Taylor,* 451 U.S. 527 [101 S.Ct. 1908] (1981), is not to the contrary. . . .

". . . .

"[The company'] argument misses *Parratt*'s point. In *Parratt,* the Court emphasized that it was dealing with 'a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.' 45 U.S. at 541 [101 S.Ct. at 1916]. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference — whether the Commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. See *Id.,* at 545 [101 S.Ct. at 1918] (second concurring opinion). Unlike the complainant in *Parratt,* Logan is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedure safeguards."

455 U.S. at 434-36, 102 S.Ct. at 1156-58.

In the case before us, Joiner and Milner are challenging the town council's actions, not an established state procedure, so *Parratt* is more apposite than *Logan*. The evidence indicates that the "Town of Morris Personnel Policy" provides for a post-termination appeal and hearing. An employee is entitled to written notice setting forth the reasons for his termination and is entitled to a hearing on his termination. The hearing may be before either the town council or an appointed hearing officer. An employee has the right to representation by an attorney and may call witnesses and present evidence at the hearing. Subsequent to the hearing, the employee has the further right to judicial review of the proceedings by the circuit court.

The evidence also indicates that instead of pursuing the post-termination procedures, the plaintiffs opted to amend their complaint (which had been filed before they were terminated) to use the termination as another theory for recovery on their state law and § 1983 claims.

Considering all the evidence, we hold that the town did not deprive Joiner and Milner of property without due process of law in relation to their claims concerning their termination, *Parratt*, and that the trial court erred in submitting that claim to the jury. We intend that holding to be construed narrowly. We do not address whether the trial court erred in submitting to the jury the plaintiffs' claims of a deprivation of property without due process based on the pay cuts and Joiner's loss of his family's insurance.

As to the plaintiffs' free speech claims, the law on deprivations of freedom of speech is clearly established, unlike the law relating to due process that we have just discussed, although the application of the law to facts in the context of free speech claims has produced dramatically different results in seemingly similar factual situations. "It is clear that a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct.

2891, 2896, 97 L.Ed.2d 315 (1987). The threshold question in determining whether an adverse employment decision violates the right to freedom of speech is whether the speech at issue may be fairly characterized as speech on a public concern. *Id.*, at 384, 107 S.Ct. at 2897. If it is, the court must balance the interests of the employee as a citizen in commenting upon public concern with the interest of the state, as employer, in promoting the efficiency of the public services it performs through its employees. *Id.*

Whether speech is protected is an issue of law, reviewable de novo on appeal. *Id.*, at 385-86, 107 S.Ct. at 2897-98. If it is determined as a matter of law that the speech is protected, the plaintiff must prove that the speech was a substantial or motivating factor in the challenged employment decision. *Mount Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). The burden then shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision . . . in the absence of the protected activity." *Id.* These last two issues are fact questions. *Id.*

In addition to the evidence that we have already discussed, the Town's mayor testified in deposition and at trial that he thought the town council's actions against Joiner and Milner were retaliation for their telling about the tire purchases.

We must first determine whether Joiner and Milner's communications in turning in Peyton and Keith to the mayor and town council were a matter of public concern. Speech on matters of public concern has been defined as speech "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1983). That inquiry into what is a public concern requires a court to consider the content, form, and context of the speech at issue, as revealed by the entire record. *Rankin,* 483 U.S. at 385, 107 S.Ct. at 2897.

In determining whether speech is a matter of public concern, many courts have particularly focused on the extent to

which the content of the employee's speech was calculated to disclose wrongdoing, inefficiency, or other malfeasance on the part of governmental officials in the conduct of their official duties. See *Wulf v. City of Wichita,* 883 F.2d 842, 857 (10th Cir. 1989); *Koch v. City of Hutchinson,* 847 F.2d 1436, 1445, 46 n. 17 (10th Cir. 1988), cert. denied, 488 U.S. 909, 109 S.Ct. 262, 102 L.Ed.2d 250 (1988), and the numerous cases cited in *Wulf* and *Koch* for this proposition.

Considering the above discussion, we hold that Joiner and Milner's speech in turning in the councilmen for the improper tire purchases was a matter of public concern. We further hold that on balance, Joiner and Milner's interest (as well as the public's), in the free speech involved in turning in Keith and Peyton outweighed any purported state interest in promoting the efficiency of public services. The law should not allow the Town to create problems with Joiner and Milner because of their reporting the improper tire purchases and then use the very problems it created as a basis for saying that it has a greater interest in efficiency of public services than Joiner and Milner have in free speech.

Furthermore, the plaintiffs presented substantial evidence that the speech was a substantial or motivating factor in the challenged employment decisions. Even the mayor of the Town said, both in his deposition and again at trial that he thought the town council's actions were retaliation for Joiner and Milner's telling about the improper tire purchases.

The trial court did not err in submitting to the jury the plaintiffs' 42 U.S.C. § 1983 claim alleging a violation of their right to free speech. See *Wulf; Reeves v. Claiborne County Board of Education,* 828 F.2d 1096 (5th Cir. 1987); *Sykes v. McDowell,* 786 F.2d 1098 (11th Cir. 1986); *Robb v. City of Philadelphia,* 733 F.2d 286 (3d Cir. 1984); *Allen v. Autauga County Board of Education,* 685 F.2d 1302 (11th Cir. 1982); *Kingsville Independent School District v. Cooper,* 611 F.2d 1109 (5th Cir. 1980).

We are aware that there are cases that might suggests a contrary result. See *Morales v. Stierheim,* 848 F.2d 1145 (11th Cir. 1988); *Cooper v. Johnson,* 590 F.2d 559 (4th Cir. 1979);

Kannisto v. City & County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied 430 U.S. 931, 97 S.Ct. 1552, 51 L.Ed.2d 775 (1977); *Wood v. Town of Frederica,* 529 F.Supp. 403 (D.Del. 1982), aff'd at 688 F.2d 828 (3d Cir. 1982); *Hoopes v. Nacrelli,* 512 F.Supp. 363 (E.D.Pa. 1981).

The trial court properly submitted the plaintiffs' free speech claim to the jury, but it erred in submitting to the jury their claim for deprivation of property allegedly without due process because of their termination. The jury returned a general verdict. In *South Central Bell Tel. Co. v. Branum,* 568 So.2d 795 (Ala. 1990), we addressed the effect of a general verdict when a case contains a "good" count (i.e., one properly submitted to the jury) and a "bad" count (i.e., one improperly submitted to the jury). In that case, we held that if a good count and a bad count go the jury and the jury returns a general verdict, this Court cannot presume that the verdict was returned on the good count. 568 So.2d at 798. See also *Aspinwall v. Gowens,* 405 So.2d 134 (Ala. 1981).

Accordingly, the judgment is due to be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SHORES, ADAMS, HOUSTON, STEAGALL and KENNEDY, JJ., concur.

INGRAM, J., concurs in the result in part and dissents in part.

INGRAM, Justice (concurring in the result in part and dissenting in parT):

In this action, the plaintiffs sued the members of the town council of the Town of Morris, in their official capacity. The plaintiffs alleged that the town council members denied them due process of law and violated their rights to free speech under the first amendment and were therefore liable for damages pursuant to 42 U.S.C. § 1983. The essence of their claim is that the town council members, acting under the color of their office, retaliated against the plaintiffs for speaking out regarding an incident concerning the improper purchase of tires by two councilmen through the town's account. The plaintiffs alleged that the members of the town council terminated them for this "whistle-blowing" activity.

The defendants named in the original complaint were designated as follows:

> "EARL PEYTON, individually and in his official capacity as member of the Town Council of Morris, Alabama; GENE CHAMBERS, in his official capacity as member of the Town Council of Morris, Alabama; ED RENO, in his official capacity as member of the Town Council of Morris, Alabama; CHARLIE LOLLAR, in his official capacity as member of the Town Council of Morris, Alabama; LAMAR REID, in his official capacity as Mayor of the Town of Morris, Alabama; and FRANK KEITH, individually and in his capacity as member of the Town Council of Morris, Alabama."

By the time of trial, no council member named in the original complaint was still in office. Under Rule 25(d)(1), A.R.Civ.P., the successors in office to the originally named defendants, who were sued in their official capacity, were automatically substituted.[1]

---

[1] Rule (25)(d)(1), A.R.Civ.P., states:

> "When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases

A suit against the town council and the mayor of the Town of Morris, in their official capacities, is for all intents and purposes an action against the Town of Morris. *See Brandon v. Holt,* 469 U.S. 464, 469, 105 S.Ct. 873, 876, 83 L.Ed.2d 878 (1985); *Monell v. New York City Department of Social Services,* 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 2035 n. 55, 56 L.Ed.2d 611 (1978). In official-capacity suits, such as this one, the plaintiffs seek to impose liability upon the governmental entity that the named defendants represent, here the Town of Morris. In order to recover under § 1983 in an official-capacity suit, the plaintiffs must allege and prove that the entity was a moving force behind the deprivation and that the entity's policy or custom played a part in the violation.

The United States Supreme Court addressed this issue in *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099 (1985). The Court stated:

> "On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. See, e.g., *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a ' "moving force" ' behind the dep-

---

to hold office, the action does not abate and his successor is automatically substituted as a party."

The corresponding federal rule has been interpreted in the following manner:

> "Should the official die [resign, or otherwise cease to hold office] pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate. In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office. See Fed.R.Civ.Proc. 25(d)(1); Fed.R.App. Proc. 43(c)(1); [United States Supreme Court] Rule 40.3."

Kentucky v. Graham, 473 U.S. 159, 166 n. 11, 105 S.Ct. 3099, 3105 n. 11, 87 L.Ed.2d 114 (1985).

> rivation, *Polk County v. Dodson,* 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (quoting *Monell, supra,* 436 U.S. at 694, 98 S.Ct. at 2037); thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law. *Monell, supra; Oklahoma City v. Tuttle,* 471 U.S. 808, 817-818, 105 S.Ct. 2427, 2433, 85 L.Ed.2d 791 (1985); *id.* at 827-828, 105 S.Ct. at 2437, 2438 (BRENNAN, J., concurring in judgment).*
>
> ---
>
> "* See *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037 ('[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983')."

Id. at 166 and n. 12, 105 S.Ct. at 3105 n. 12.

The issue in this case is whether the plaintiffs have pleaded and proved a case of action against the Town of Morris under § 1983. I believe they have not.

To reiterate, in order for a municipality to be found liable under § 1983, the plaintiffs must allege and prove a direct causal link between the municipal policy or custom and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1202-03, 103 L.Ed.2d 412 (1989). The plaintiffs must allege and prove that "the 'execution of the government's policy or custom . . . inflict[ed] the injury.' " *Id.* (quoting *City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, 267, 107 S.Ct. 1114, 1119, 94 L.Ed.2d 293 (1987) (O'Connor, J., dissenting) (quoting *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037)).

In the pre-trial order in the present case, the trial court stated:

> "Plaintiffs have brought this action under 42 U.S.C. § 1983. Plaintiffs contend that they were illegally and unlawfully discharged as employees of the Town of Morris. They contend that they were discharged, *in violation of the personnel policy of the Town of Morris* and the Fourteenth Amendment to the Constitution of the United States, as employees of said Town without just cause, and that they were not given a pre-termination hearing, and that they were discharged for exercising their First Amendment rights.
>
> " . . .
>
> "On oral motion of the plaintiffs, in Open Court, all claims heretofore stated in their complaint which are not set forth herein are hereby dismissed.
>
> "All the claims of the plaintiffs, respectively, are asserted pursuant to 42 U.S.C. § 1983, and the claim for attorney fees is pursuant to [42 U.S.C. § 1988]."

(Emphasis added.)

Further, the following charge was requested by the plaintiffs and was given by the trial court:

> "Plaintiffs claim that the Town of Morris violated Section 1983 of Title 42 of the United States Code. That section entitles a person to *recover damages against a defendant who, while appearing to act under the authority of law,* deprived plaintiff[s] of rights guaranteed by the Constitution.

(Emphasis added.)

Also, the plaintiffs produced no evidence or testimony, nor do they argue, that they were discharged pursuant to some policy or custom of the Town of Morris, nor did they allege that the single event of their discharge constituted a "policy or custom" of the Town of Morris.[2] "The [Town of Morris] can-

---

[2]A recent United States Supreme Court decision seems to hold that an action may be maintained against a municipality when the highest policy-making authority of the municipality has made a single decision. *City of St.*

not be held liable under § 1983 unless [the plaintiffs] prove the existence of an unconstitutional municipal policy." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988).

In this case, the plaintiffs consistently assert that they were discharged because they had "blown the whistle" on an allegedly improper purchase of tires by two "sitting" councilmen and that their discharge violated the personnel policy of the town. Their claims, under § 1983, arise not from the effectuation of some policy or custom of the Town of Morris; indeed, the plaintiffs allege that their discharge violated the policy of the Town of Morris. This is not sufficient to state a claim against the Town of Morris under § 1983 for deprivation of constitutional rights as a result of the town's policy or custom. Because the plaintiffs have failed to state a claim for relief, under § 1983, against the Town of Morris, and the plaintiffs dismissed with prejudice their claims against those members of the town council who were sued in their individual capacity, there is no ground upon which relief can be granted. Therefore, the verdict of the jury against the current town council members in their official capacities is due to be reversed, and the cause remanded to the trial court for entry of judgment in favor of the defendants. I respectfully dissent from that part of the majority opinion that remands the case to the trial court for retrial of the First Amendment issue, and I concur in the result regarding the alleged denial of due process.

Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 923-24 (1989). The Supreme Court held that under certain circumstances a single decision could represent the "policy" of the governmental entity. *Id.* In *Praprotnik*, the respondent was not successful in alleging a cause of action against the City of St. Louis because he had failed to allege and to prove the existence of an unconstitutional policy, and he had not contended that anyone had ever promulgated such a policy. He also failed to prove that the deprivation of his rights was the "custom" of St. Louis. *Id.* at 128, 108 S.Ct. at 926.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JIM JOINER AND	*	
JOHN MILNER,	*	Civil Action No. CV 84-1554
Plaintiffs,	*	
VS.	*	**FILED IN OFFICE**
		NOV 19, 1990
JIM ROBERTS, et al.,	*	**POLLY CONRADI,**
Defendants.	*	**CLERK CIRCUIT COURT**

ORDER

The trial of this cause concluded on Friday, June 22, 1990 with the rendering of jury verdicts in favor of the plaintiffs. The Court conducted a hearing on Friday, August 17, 1990 to consider the defendants' post-trial motions, the plaintiffs' petitions for awards of lost compensation and plaintiff John Milner's petition for reinstatement. Having considered the entire trial and post-trial records, including post-trial motions, submissions and arguments by counsel for all parties, it is hereby ordered, adjudged and decreed that judgment in this cause is rendered, and the Clerk of the Court is directed to enter forthwith this Order and judgment, as follows:

1. The term "Defendants", as used in this Order, shall mean defendants Jim Roberts, Terry Scott, Joyce Ballard, Violet Regland, Truman Crane, Bill Parrish in their official capacities as mayor and/or council members of the Town of Morris, and the Town of Morris.

2. The Court finds that, as a matter of law, plaintiffs Jim Joiner and John Milner each had a property interest in their continued employment with the Town of Morris due to the fact that, under the terms of the Town's personnel policy, they were non-probationary employees and could be terminated only for cause.

3. The Court finds that, as a matter of law, plaintiffs Jim Joiner and John Milner each had a property interest in the

wages they were entitled to receive from their continued employment with the Town of Morris.

4. The Court finds that, as a matter of law, plaintiff Jim Joiner had a property interest in the medical insurance benefits he was entitled to receive from his continued employment with the Town of Morris.

5. The Court finds that the plaintiffs were not accorded the process due them under the Fourteenth Amendment of the United States Constitution, prior to the termination of plaintiff Joiner's medical insurance benefits, the decrease in plaintiffs' wages and the termination of plaintiffs' employment.

6. The Court finds that, as a matter of law, plaintiff Jim Joiner, as the duly appointed Chief of Police of the Town of Morris, had a right to continued employment pursuant to the terms and requirements of Alabama Code Section 11-43-160.

7. The Court finds that the plaintiffs' statements, about councilmen Earl Peyton and Frank Keith purchasing tires through the account of the Town of Morris, were protected by the First Amendment to the United States Constitution and those statements could not lawfully serve as a basis for terminating the plaintiffs' employment, nor could those statements lawfully serve as a basis for decreasing Plaintiffs' wages prior to terminating their employment, nor could those statements lawfully serve as a basis for terminating the medical insurance benefits of plaintiff Jim Joiner.

8. The Court finds that there was sufficient evidence from which the trier of fact could reasonably conclude that the plaintiffs' employment was unlawfully terminated due to, and in retaliation for, the plaintiffs' statements about councilmen Earl Peyton and Frank Keith purchasing tires through the account of the Town of Morris.

9. The Court finds that there was sufficient evidence from which the trier of fact could reasonably conclude that the plaintiffs suffered mental anguish and injury to their respective reputations as a result of the termination of their employment with the Town of Morris.

10. The Court finds that there was sufficient evidence from which the trier of fact could reasonably conclude that, prior to the termination of plaintiffs' employment, plaintiffs' wages were unlawfully decreased due to, and in retaliation for, plaintiffs' statements about councilmen Earl Peyton and Frank Keith purchasing tires through the account of the Town of Morris.

11. The Court finds that there was sufficient evidence from which the trier of fact could reasonably conclude that the plaintiffs suffered mental anguish as a result of the decrease in their wages prior to the termination of their employment with the Town of Morris.

12. The Court finds that there was sufficient evidence from which the trier of fact could reasonably conclude that the medical insurance benefits of plaintiff Jim Joiner were unlawfully terminated due to, and in retaliation for, plaintiff Jim Joiner's statements about councilmen Earl Peyton and Frank Keith purchasing tires through the account of the Town of Morris.

13. The Court finds that there was sufficient evidence from which the trier of fact could reasonably conclude that plaintiff Jim Joiner suffered mental anguish as a result of the termination of his medical insurance benefits.

14. The Court finds that there was sufficient evidence from which the trier of fact could reasonably conclude that the plaintiffs were not given a pretermination hearing prior the termination of their employment, as required by the Fourteenth Amendment of the United States Constitution.

15. The Court observed the jury throughout the trial; the jurors were attentive to the evidence presented and there is no reason to believe that the verdicts for the plaintiffs resulted from bias, passion or prejudice on the part of the jury.

16. Defendants' motion for judgment notwithstanding the verdict, motion for new trial and motion for remittitur are denied.

17. In accordance with the verdict of the jury, judgment is rendered against Defendants and in favor of plaintiff Jim Joiner in the amount of one hundred thousand dollars ($100,000.00) as compensation for plaintiff's mental anguish and damage to reputation resulting from the termination of his employment, and as compensation for plaintiff's mental anguish resulting from the decrease of his wages and the termination of his medical insurance benefits prior to the termination of his employment.

18. In accordance with the verdict of the jury, judgment is rendered against Defendants and in favor of Plaintiff John Milner, in the amount of One Hundred Thousand Dollars ($100,000.00) as compensation for Plaintiff's mental anguish and damages to reputation resulting from the termination of his employment, and as compensation for Plaintiff's mental anguish resulting from the decrease of his wages prior to the termination of his employment.

19. Judgment is rendered against Defendants and in favor of Plaintiff Jim Joiner in the amount of Twenty-Five Thousand Four Hundred Thirty Dollars ($25,430.00), which amount is composed of the following items: (a) Nineteen Thousand Eight Hundred Thirty-Eight Dollars ($19,838.00) as compensation for his lost wages; and (b) Five Thousand Five Hundred Ninety-Two Dollars ($5,592.00) as compensation for his lost insurance premium payment benefits.

20. Judgment is rendered against Defendants and in favor of Plaintiff John Milner in the amount of Thirty-Nine Thousand Thirty-Four Dollars and Six cents ($39,034.06) as compensation for his lost wages accrued as of the commencement of the trial on June 18, 1990.

21. Judgment is rendered against Defendants and in favor of Plaintiff John Milner on Plaintiff's Petition for Reinstatement to the police force of the Town of Morris. Defendants are hereby ordered to reinstate, forthwith, Plaintiff John Milner to the position, rank and title held by said Plaintiff at the time of Plaintiff's wrongful termination. Defendants are

further Ordered to provide Plaintiff all of the rights and benefits accruing from said reinstatement.

22. In addition to the Court's consideration of the testimony and evidence presented at trial, and the post-trial submissions and arguments of Counsel, in determining the amounts awarded to Plaintiffs in paragraphs 16 and 17 above, the Court has considered and hereby adopts the calculations (and explanations therefor) contained in that certain letter brief of August 17, 1990, and its referenced documents, submitted to this Court by Plaintiffs' Counsel, Gary P. Cody. The letter brief, and its referenced documents, are hereby incorporated by reference into this Order and made a part of the record of this action.

23. Plaintiffs' Counsel are hereby allowed thirty (30) days from the date of entry of this Order to submit an application for award of attorney fees.

24. Costs are taxed to the Defendants.

Done this 16th day of November, 1990.

/s/ Donald W. Stewart

Donald W. Stewart, Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Order on the Counsel for the parties in this case on this 16th day of November, 1990.

/s/ Ramona Baker
Ramona Baker, Secretary

Gary P. Cody, Esq. (Counsel for Plaintiffs)
Michael J. Evans, Esq.
1900 City Federal Building
Birmingham, AL 35203

C. Peter Bolvig, Esq. (Counsel for Defendants)
505 N. 20th Street
1400 Financial Center
Birmingham, AL 35203

JIM JOINER and JOHN MILNER Plaintiffs v. EARL PEYTON, individually and in his official capacity as member of the Town Council of Morris, Alabama; GENE CHAMBERS, in his official capacity as member of the Town Council of Morris, Alabama; ED RENO, in his official capacity as member of the Town Council of Morris, Alabama; CHARLIE LOLLAR, in his official capacity as member of the Town Council of Morris, Alabama; LAMAR REID, in his official capacity as Mayor of the Town of Morris, Alabama; and FRANK KEITH, individually and in his official capacity as member of the Town Council of Morris, Alabama Defendants	)	IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF ALABAMA CASE NO. CV 84 1554 **FILED IN OFFICE** **MAR 23 1984** **POLLY CONRADI,** **CLERK CIRCUIT COURT**

COMPLAINT

1. Plaintiff Jim Joiner is Chief of Police of the Town of Morris, Alabama. Plaintiff John Milner is employed by the Town of Morris, Alabama as a police officer holding the rank of Sergeant.

2. Defendants Earl Peyton, Frank Keith, Gene Chambers, Ed Reno and Charlie Lollar are members of the Town Council of the Town of Morris, Alabama. Defendant Lamar Reid is Mayor of the Town of Morris, Alabama.

3. Defendants Gene Chambers, Ed Reno, Charlie Lollar and Lamar Reid are sued in their official capacities only. Defendants Earl Peyton and Frank Keith are sued both individually and in their official capacity as members of the Town Council of the Town of Morris, Alabama.

4. In late November or early December, 1983, Plaintiffs Jim Joiner and John Milner learned that Defendants Earl Peyton and Frank Keith had been purchasing tires for their personal use through the Town of Morris. By purchasing the tires through the Town of Morris, Defendants were able to avoid paying the state and federal taxes on the tires, and were able to purchase the tires at an amount less than the retail price. Copies of invoices documenting the aforementioned purchases are attached hereto as Exhibit "A".

5. In late November or early December of 1983, Plaintiffs Jim Joiner and John Milner informed the Mayor of the Town of Morris about the fact that the Defendants Earl Peyton and Frank Keith were purchasing tires for their personal use through the Town of Morris.

6. On Sunday, December 18, 1983, there was held a special session of the Town Council of the Town of Morris. The subject of the special session was the fact that the Defendants Earl Peyton and Frank Keith had purchased tires for their personal cars using purchase orders from the Town of Morris. The Town Council voted to permit Defendants Peyton and Keith to pay the difference in the discounted price and the full purchase price to the store where the purchases were made. A copy of the minutes of the special session on December 18, 1983 is attached hereto as Exhibit "B".

7. Subsequent to the Council meeting held on December 18, 1983, certain members of the Council stated that the Council was going to "get" Plaintiffs. On December 21, 1983, Defendant Frank Keith told Plaintiff John Milner that Frank Keith was going to take a much bigger hand in running the Police Department from that point on.

8. On January 5, 1984, Mayor Lamar Reid instructed Plaintiff Jim Joiner to return copies of the records which document the fact that Earl Peyton and Frank Keith purchased tires through the Town of Morris.

9. At the January 10, 1984 regular session of the Town Council of the Town of Morris, Defendant Frank Keith made a motion that the town lay off its police dispatcher, demote one of the police officers to the dispatcher's position and cut the salary of all full time employees by 5%. Mayor Lamar Reid requested additional time to review the financial records prior to the vote and did not consent to have the matter voted on at the January 10, 1984 session of the Town Council. The motion carried over the opposition of the Mayor, with the Mayor voting "no" and Defendants Earl Peyton, Frank Keith, Gene Chambers and Ed Reno voting "yes." Defendant Charlie Lollar was absent and did not vote. Subsequent to the time that Plaintiffs brought the tire purchases to the attention of the Mayor, Defendant Frank Keith shouted and cursed at Plaintiff John Milner in the presence of Plaintiff Jim Joiner and Defendant Earl Peyton. A copy of the minutes of the January 10, 1984 session of the Town Council is attached hereto as Exhibit "C".

10. On February 28, 1984, the Town Council discussed the insurance provided by the town for Plaintiff Jim Joiner's family. Plaintiffs aver that, at the time Plaintiff Jim Joiner was hired by the Town of Morris, a part of his contract was the provision that the Town of Morris would pay for health insurance on his family. Plaintiffs further aver that Plaintiff Jim Joiner submitted a letter of resignation to the Town of Morris effective February 14, 1982. Plaintiffs further aver that Plaintiff Jim Joiner was rehired by the Town of Morris, on the same terms and conditions that apply to his previous employment, and Plaintiffs specifically aver that Plaintiff Jim Joiner was rehired with an agreement that the town would furnish the health insurance for Plaintiff Jim Joiner's family.

At the February 28, 1984 Council meeting, the Council discussed the opinion of some of the members of the Council that the town should not have been paying the insurance premiums for the family of Plaintiff Jim Joiner since the date of his resignation of February, 1982. Defendant Frank Keith made a motion that the Town of Morris retain its City Attorney to recover the money spent on insurance premiums on the family of Plaintiff Jim Joiner. Defendant Earl Peyton seconded the motion, and Defendants Earl Peyton, Frank Keith, Gene Chambers and Ed Reno voted in favor of the motion. Mayor Lamar Reid and Councilman Charlie Lollar voted against the motion. No other motion was made with respect to the insurance premiums for Plaintiff's family. A copy of the minutes of the February 28, 1984 session of the Town Council is attached hereto as Exhibit "D".

11. On March 13, 1984, the Town Council and the Mayor made a request that the members of the Police Department meet with the Mayor and the Town Council on March 15, 1985. On March 15, 1984, Plaintiffs Jim Joiner and John Milner, together with Police Officer Cary Ward, appeared at the Town Hall to meet with the Mayor and the Council. Police Officer Cary Ward was told by one of the Defendants that he was not to attend the meeting. Thereafter, the Council and the Mayor met with Plaintiffs Jim Joiner and John Milner and certain members of the Council expressed their displeasure at the fact that the Plaintiffs had made known the information about the tire purchases made by Defendants Earl Peyton and Frank Keith.

12. On March 12, 1984, Defendant Frank Keith gave to Plaintiffs a revised work schedule, assigning new dates and times for Plaintiffs to work, which dates and times are inconvenient for Plaintiffs. Plaintiffs aver that the work schedule was reviewed for the purpose of harassing the Plaintiffs.

13. On March 30, 1984, the City Clerk for the Town of Morris gave Plaintiff Jim Joiner written notice that the town had cancelled the insurance on Plaintiff Joiner's family. Plain-

tiffs aver that this cancellation was a breach of the town's contract of employment with Plaintiff Jim Joiner, and Plaintiffs further aver that said breach was done in bad faith and for the purpose of retaliating against Plaintiff for making known the information about the tire purchases by Defendants Peyton and Keith.

14. Plaintiffs aver that all of the statements made by them concerning the tire purchases by Defendants Peyton and Keith were statements which are protected by the First Amendment to the Constitution of the United States. Plaintiffs further aver that, in retaliation for Plaintiffs' exercise of their rights to freedom of speech, Defendants cut Plaintiffs' pay, verbally abused Plaintiffs, revised Plaintiffs' work schedule to create an inconvenient and unsuitable work schedule for Plaintiffs, and wrongfully deprived Plaintiff Jim Joiner's right to health insurance for his family. Plaintiffs aver that each of the aforementioned acts was done wilfully, intentionally, and with malice towards Plaintiffs.

15. As a direct and proximate result of the aforesaid acts of Defendants, Plaintiffs have suffered mental anguish, and have been wrongfully deprived of 5% of their salary and insurance for the family of Plaintiff Jim Joiner.

COUNT ONE

1. Plaintiffs adopt each and every allegation in paragraphs 1 through 15 as is fully set out herein.

2. The acts of the Defendants, set out above, deprive Plaintiffs of their right to freedom of speech under the First Amendment to the United States Constitution and further constitute a deprivation of Plaintiffs' property without due process of law, all in violation of 42 USC § 1983.

COUNT TWO

1. Plaintiffs adopt each and every allegation in paragraphs 1 through 15 as is fully set out herein.

2. Plaintiff Jim Joiner claims of Defendants damages for breach of the town's contract to furnish insurance for Plaintiff Jim Joiner's family. Plaintiff claims that the acts of the Defendants constitute the tort of bad faith, and claims damages for both the breach of contract and the tort of bad faith.

COUNT THREE

1. Plaintiffs adopt each and every allegation in paragraphs 1 through 15 as is fully set out herein.

2. The acts of the Defendants set out above constitute the tort of outrage.

COUNT FOUR

1. Plaintiffs adopt each and every allegation in paragraphs 1 through 15 as is fully set out herein.

2. Plaintiffs claim of Defendants damages for the intentional infliction of emotional distress.

WHEREFORE, PREMISES, CONSIDERED, Plaintiffs demand judgment against Deffendants for each count, separately and severally in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00), plus costs for this action, including a reasonable attorneys fee.

/s/ Michael J. Evans

MICHAEL J. EVANS
Attorney for Plaintiffs
1329 Brown Marx Tower
Birmingham, Al. 35203
251-2412

PLAINTIFFS DEMAND A TRIAL BY JURY.

/s/ Michael J. Evans

PLAINTIFFS' ADDRESSES:

John Milner
Jim Joiner
c/o Morris Police Department

DEFENDANTS' ADDRESSES:

Earl Peyton
c/o Town Hall
Morris, Alabama 35116

Charlie Lollar
c/o Town Hall
Morris, Alabama 35116

Gene Chambers
c/o Town Hall
Morris, Alabama 35116

Lamar Reid
c/o Town Hall
Morris, Alabama 35116

Ed Reno
c/o Town Hall
Morris, Alabama 35116

Frank Keith
c/o Town Hall
Morris, Alabama 35116

EXHIBIT "B"

THE TOWN COUNCIL OF THE TOWN OF MORRIS MET IN SPECIAL SESSION ON DECEMBER 18TH, 1983 CONCERNING PURCHASES

Members present: Frank Keith, Gene Chambers, Ed Reno, Charlie Lollar, Earl Peyton and Mayor Reid.

Meeting was opened by statements from Ed Reno and Lamar Reid about pulling Council together.

The matter discussed was a situation that had brought to Council's attention that two of the Council members had purchased tires for their personal cars from a Purchase Order from the Town. They in turn paid the City Clerk by Check for this discounted purchase.

After discussion, Council and Mayor decided on this action:

1. Council members in question would pay the difference in discounted price and full purchase price to the store where purchase was made.

2. Mr. Peyton resigned his appointed job as person responsible for approving Purchase Orders.

3. Mr. Keith requested a few days to think on the matter before making a decision about resigning his job as person responsible for approving Purchase Orders.

No other business transacted.

Meeting adjourned.

_____
MAYOR

/s/ Anna C. Grooms
TOWN CLERK

EXHIBIT "C"

THE TOWN COUNCIL OF THE TOWN OF MORRIS MET IN REGULAR SESSION ON JANUARY 10TH, 1984.

Members present: Frank Keith, Gene Chambers, Earl Peyton, Ed Reno and Mayor Reid. Charlie Lollar absent.

Frank Keith led in prayer.

Minutes from the last regular meeting were read and approved by a motion from Frank Keith. Earl Peyton seconded the motion. Vote unanimous. MOTION CARRIED.

Mayor Reid announces that the Man and Woman of the Year Function will be Saturday night @ 7:00 P.M., the 14th of January. Everyone is invited to attend.

Ed Reno speaks about the improvements for the Park. Mayor Reid explains that the Park equipment has been abused and how the Park needs to be upgraded. Ed Reno explains that he has met with the County and they will put in a new road to the new Ball Field, but the Town will have to pay for the cost of the labor. Frank Keith recommends that the Council table any further decision until bid for the labor of a new road is received.

Frank Keith makes a motion to table any decisions on the appointment of a Grievance Board until all Council members are present. Gene Chambers seconds the motion. Vote unanimous. MOTION CARRIED.

Ed Reno makes a motion to cancel any Ordinance pertaining to Noise and Nuisances. Gene Chambers seconds the motion. Vote unanimous. MOTION CARRIED.

Mayor Reid reads contract between Gardendale HRZ and the Town concerning the use of the Library at the Community School. Earl Peyton makes a motion to accept the contract as read. Frank Keith seconds the motion. Vote unanimous. MOTION CARRIED.

Mayor Reid discusses the painting of the Medical Center. Earl Peyton appointed to call Gorman Chastain and handle the job immediately.

Ed Reno discusses light poles that are not in use at the Ball Park. He recommends that they are sold to Reno & Son for the price of $20.00. Frank Keith makes a motion to sell the two poles to Reno & Son for $20. Gene Chambers seconds the motion. Vote unanimous. MOTION CARRIED.

Ed Reno discusses five hazards within the Town limits. House on Stouts Road and Morris-Majestic Road is now vacant and has become very much a fire hazard. This house needs to be condemned and tore down. The old Post Office Bldg. is also deteriorating from being vacant and abused, and is fast becoming a fire hazard to surrounding business and homes. Mayor Reid appoints Frank Keith to meet with Town's attorney and start proper procedures that the Town must follow in handling the condemnation of property.

Frank Keith discusses the alleyway by Enon Baptist Church. Council agrees that the Town will not make a lease for this section, but would provide letter stating that the Town agrees to let the Church use the alleyway for Parking space.

Frank Keith discusses the financial status of the Town at the present time. Frank Keith makes a motion that the Town lay off Jimmy Traywick, replace Frankie Witt to dispatcher's position, and take a 5% Pay Salary decrease to all regular full time employees and hereafter Council will make an in-depth study of finances every 30 days. Earl Peyton seconds the motion. Vote taken — Frank Keith, Gene Chambers, Ed Reno and Earl Peyton — YES. Mayor Reid — NO. MOTION CARRIED.

Frank Keith offers statement of a Daily shift report that will become a part of each patrolman's duty to fill out during their shift. Council agrees that this should become part of the patrolman's daily duties.

Earl Peyton discusses proposal on policemen logging In and Out of Service with dispatcher and/or clerk while on duty. Earl Peyton makes a motion that the Town adopt this proce-

dure as part of regular work duties. Frank Keith seconds the motion. Vote unanimous. MOTION CARRIED.

Earl Peyton discusses slabs in front of City Hall designating Parking Spaces. He recommends pouring one complete slab to make the stops for each space and proposes a cost of approximately $200-$250. Gene Chambers makes a Motion that the Town construct the slab for a cost of no more than $250.00. Earl Peyton seconds the Motion. Vote Unanimous. MOTION CARRIED.

Frank Keith makes a motion to adjourn. Earl Peyton seconds the motion. Vote unanimous. MOTION CARRIED.

Meeting adjourned.

/s/ Lamar Reid
MAYOR

/s/ Anna C. Grooms
TOWN CLERK

EXHIBIT "D"

THE TOWN COUNCIL OF THE TOWN OF MORRIS MET IN REGULAR SESSION ON FEBRUARY 28TH, 1984

Members present: Frank Keith, Gene Chambers, Ed Reno, Charlie Lollar, Earl Peyton and Mayor Reid.

Mayor Reid led in prayer.

Minutes from the last regular meeting were read and approved by a motion from Earl Peyton. Charlie Lollar seconded the motion. Vote unanimous. MOTION CARRIED.

Chambers questions statement made by Auditor's concerning reimbursed postage being it was money received due to the Zoning Ordinance and the charges collected when rezoning property.

Mayor Reid discusses Ordinance concerning the condemnation of buildings and reads letter from Attorney Wayne Wheeler on the subject. The residence under question about being a fire hazard is now being occupied. Earl Peyton makes a motion to table any consideration of such an Ordinance. Ed Reno seconds the motion. Vote unanimous. MOTION CARRIED.

Ed Reno discusses the bids received for the new lights at the Ballpark. There is a need for 40 lights to be purchased and the following bids were submitted: Mayer Electric — $169.00/each; Buffalo Electric Co. — $180.00/each; WESCO — $164.00/each; Lighting & Lamp — $175./each. The installation bids were: Overby in Gardendale , $3,400.00; Maze Electric — $3,100. and Landrum Electric — $2,475.00. Ed Reno recommends that the Town accept the lowest bid for the lights and installation. After discussion, Earl Peyton makes a motion that the Town borrow $5,000. to purchase lights for the Ballpark and the Morris Youth Assoc. will pay the balance. The loan to be repaid on a long term loan. Ed Reno seconds the motion. Vote taken — Five, yes. Charlie Lollar — NO. MOTION CARRIED.

Ed Reno discusses dispatcher for the Police Dept. and the Fire Dept. Charlie Lollar explains how this employee could be used for the Street Dept. Council agrees to table the matter until later date.

Frank Keith discusses the Auditor's report for the calendar year '82-'83. The paragraph on Insurance Liability is wrong as the Town does not carry liability insurance. Council agrees to return all statements and write letter to Auditors asking them to meet with the Town's Insurance Agent, Mark Myatt to discuss this matter since it was the same mistake last year. Frank Keith also recommends that any letters or statements that the Auditor has should be entered in the Final Audit statements.

Frank Keith discusses the $500.00 donation to the Library Fund that is listed in the budget for the calendar year '83-'84. After discussion, Frank Keith makes a motion that the Town transfer the $500. from the General Fund into the Library Fund immediately. Charlie Lollar seconds the motion. Vote taken — Five, yes. Mayor Reid — Opposed. MOTION CARRIED.

Gene Chambers questions the Insurance premiums paid for the Employees and the full family coverage that has been paid on the Police Chief. The Town's Insurance was handled by Blue Cross Insur. and is now being handled by Nationwide Insur. at a savings. There are no minutes from a Council meeting stating that the change has been approved. There is also a motion from the floor dated Jan., 1982 that the Town will provide all new employees with single coverage insur. only and if the employees desires full family coverage then the town will deduct the amount necessary to cover the additional cost. Since Police Chief, Jim Joiner had resigned from his position on Feb., 1982 and returned to work in March, 1982, then the Town should not have been paying his insurance premiums in full. There are no minutes reflecting any different approval for such costs. He would be considered a new employee. Frank Keith makes a motion that the Town attain the Town's lawyer to recover the money spent on insurance premiums on Police Chief Joiner illegally. Earl Peyton seconds the motion. Vote

taken — Frank Keith, Gene Chambers, Ed Reno and Earl Peyton — YES. Mayor Reid and Charlie Lollar — NO. MOTION CARRIED.

Earl Peyton discusses the Town Clerk wanting to be off on Wednesday at the present time until Sept. Earl Peyton makes a motion that the Town permits Clerk to be off on Wednesdays. Gene Chambers seconds the motion. Vote unanimous. MOTION CARRIED.

Earl Peyton discusses Street repairs that are presently needed on Sardis Road and Rogers Drive and near the Cemetary. Gene Chambers makes a motion that the work be performed up to the expense of $200.00. Frank Keith seconds the motion. Vote unanimous. MOTION CARRIED.

Earl Peyton discusses the Circus that is going to be held by the Morris Cemetary Assoc. on the property of Mr. Rogers on the corner of Morris/Majestic Road and 1st Avenue North. Mayor Reid recommends that there be a release form signed by Kenneth Rogers before the Circus takes place giving them permission to use this vacant lot. Council agrees. Frank Keith makes a motion that the Town waiver the business license for the Circus as it is a Fund raising project. Charlie Lollar seconds the motion. Vote unanimous. MOTION CARRIED.

Mayor Reid reads Thank You Card from Gene Chambers for flowers sent during recent hospital stay.

Mayor Reid reads letter from the Town of Kimberly requesting that the Town of Morris moved their City limit sign 30 yds. back. Council agrees to let Kimberly take care of this matter.

Charlie Lollar makes a motion to adjourn. Seconded by Earl Peyton. Vote unanimous. MOTION CARRIED.

Meeting adjourned.

_____

MAYOR

_____

TOWN CLERK

FILED IN OFFICE
APR 27 1984
POLLY CONRADI,
CLERK CIRCUIT COURT

JIM JOINER and JOHN MILNER, Plaintiffs	)	IN THE CIRCUIT COURT FOR
	)	JEFFERSON COUNTY, STATE
v.	)	OF ALABAMA
EARL PEYTON, et al., Defendants	)	CASE NO. CV 84-1554

SUPPLEMENTAL COMPLAINT

Come now the Plaintiffs and supplement the Complaint heretofore filed by adding the following Paragraph X:

1. On March 29, 1984, Defendants discharged Plaintiffs from their employment as police officers with the Town of Morris, Alabama.

2. Plaintiffs were discharged as retaliation for their statements concerning purchases of tires by members of the Council of the Town of Morris, Alabama. Said discharge violated Plaintiffs' rights under the First Amendment to the Constitution of the United States.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request this Honorable Court order Plaintiffs reinstated to their position as police officers for the Town of Morris, with back pay and costs of this action.

/s/ Michael J. Evans

MICHAEL J. EVANS
Attorney for Plaintiffs
1329 Brown Marx Tower
Birmingham, Al. 35203

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Complaint has been served upon M. Wayne Wheeler & Earl Peyton, Jr., Counsel for Defendants by placing same in the U.S. Mail, first class, postage prepaid, on this the 24th day of April, 1984.

/s/ Michael J. Evans

OF COUNSEL

FILED IN OFFICE
DEC 5 1984
POLLY CONRADI,
CLERK CIRCUIT COURT

JIM JOINER and JOHN MILNER, Plaintiffs	)	IN THE CIRCUIT COURT
	)	FOR JEFFERSON COUNTY,
v.	)	STATE OF ALABMA
EARL PEYTON, et al., Defendants	)	CASE NO. CV 84-1554

AMENDED COMPLAINT

Come now the Plaintiffs in the above styled cause and amend the Complaint heretofore filed by adding the following:

COUNT FIVE

1. Plaintiffs adopt each and every allegation set out in Paragraph 1 through 15 of the original Complaint and Paragraphs 1 and 2 of their Supplemental Complaint.

2. Plaintiffs aver that they were permanent employees of the Town of Morris and had a contract of employment with the Town of Morris. Plaintiffs further aver that the terms of the contract were contained in the personnel policy of the Town of Morris and in the provisions of the Alabama Code applicable to the town's duties and responsibilities toward its police chief.

3. Plaintiffs aver that they were terminated in violation of their contract of employment with the Town of Morris. Plaintiffs further aver that the Town of Morris breached its employment contract by failing to give them written notice of the

cause of their dismissal. Plaintiffs further aver that Defendants breached said contract with Plaintiffs by terminating Plaintiffs without giving Plaintiffs a hearing before termination.

4. Plaintiffs aver that each of the breaches of contract set out in the preceding paragraph also constitute a deprivation of due process of law. Plaintiffs aver that said deprivation of due process of law violates the Fourteenth Amendment to the United States Constitution and furnishes Plaintiffs a cause of action pursuant to 42 U.S.C. Sec. 1983. Plaintiffs further allege that they were deprived of due process of law in that Defendants held a closed door meeting with Plaintiffs at which time Plaintiffs' desired to be represented by an attorney, but said attorney was excluded from said meeting.

5. Plaintiffs claim of Defendants $250,000 each as compensatory damages arising out of Defendants' breach of contract. Plaintiffs claim of Defendants an additional $250,000 each as damages for the deprivation of due process of law.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against the Defendants in the amount of $500,000 each, plus the costs of this action and a reasonable attorneys fee.

/s/ Michael J. Evans
MICHAEL J. EVANS
Attorney for Plaintiffs
1329 Brown Marx Tower
Birmingham, Al. 35203

Plaintiffs demand a trial by jury.

/s/ Michael J. Evans
MICHAEL J. EVANS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Complaint was served upon Wayne Wheeler and Earl Rogers Peyton, attorney for Defendants by placing copies of same in the U.S. Mail, first class, postage prepaid on this the 3 day of December, 1984.

/s/ Michael J. Evans

MICHAEL J. EVANS

TOWN OF MORRIS
PERSONNEL POLICY

ATTENDANCE & LEAVES

1.1 *Hours of Work.* The hours of work shall be fixed by the governing body with due regard to the convenience of the public, and to working hours customarily observed in the community.

1.2 *Types of Leave.* The following types of leave are officially established: holidays, vacation leave, sick leave, injury with payleave, overtime leave, military service leave, jury leave, leave for special meetings and examinations, and leave without pay.

1.3 *Seasonal, Temporary and Part-Time Employees.* Under no circumstances shall seasonal, temporary, and part-time employees be allowed to earn or use vacation leave, sick leave or military leave. Part-time employees are those employees who work less than forty (40) hours per week.

1.4 *No Advance Leave.* Vacation leave, sick leave, and overtime leave shall not be allowed in advance of being earned. If an employee has insufficient leave to cover a period of absence, no allowance shall be posted in advance or in anticipation of future leave credits. In such cases, payroll deductions for the time lost shall be made for the pay period in which the absence occurred.

1.5 *Attendance & Leave Reporting.* The absence of an employee from duty shall be reported to the department head. The department head shall make his report to the Town Clerk. The clerk shall maintain records of leaves of all permanent employees.

1.6 *Failure to Report Absences.* If a department head or other authority fails to report the absences of an employee and the employee is paid in excess of the amount due him, the department head or other authority shall be liable for the overpayment.

1.7 *Absence Without Leave.* An employee who is absent without leave shall be subject to disciplinary action of the department head and/or the Town Council.

1.8 *Holidays.* The Town Council shall fix by resolution, the holidays that their employees shall observe. Employees on non-pay status, such as a leave of absence, or on paid military leave, shall not earn additional time for holidays. All employees of the Town of Morris shall receive the same number of holidays. Employees who are required to work on an observed holiday shall be compensated in accordance with Rule 1.22, Sec. G.

1.9 *Vacation Leave.* All employees holding regular full-time positions in the employment of the Town of Morris shall be allowed to earn and accrue vacation with pay.

1.10 *Eligibility for Vacation Leave.* Upon completion of twelve (12) months service in a regular position, an employee shall be eligible to use vacation leave. The time of such vacation leave shall be determined by the appoint authority or department head with due consideration to seniority, length of service, and request of the employee; except that if a vacation has not been allowed an employee during the calendar year, the employee may demand that he be given a vacation not exceeding ten (10) days.

1.11 Employees who have obtained a regular full-time position with the Town of Morris shall be eligible for ten (10) days vacation.

1.12 Vacation earned, but not used during the calendar year may not be carried over into the following year.

1.13 *Restrictions of Vacation Leave.* Vacation leave shall be subject to the following restrictions:

a. An employee shall not earn vacation leave during a leave of absence without pay, a suspension, or when the employee is otherwise in a non-pay status for more than fifteen (15) calendar days in a month. An employee currently using supplemental sick leave

shall not earn additional vacation or sick leave during the period when he is on supplemental sick leave.

b. An employee who is dismissed for cause or resigns in bad standing shall forfeit his earned vacation leave.

c. An appointing authority or department head shall not require an employee to forfeit his earned vacation as punishment through the action of suspension.

d. Vacation Leave begins June 1st of Calendar Year and ends May 31st.

1.14 *Sick Leave.* All employees holding regular positions shall be allowed to earn and accrue sick leave. Sick leave is not a right for which employees may make demand, but a privilege granted in accordance prescribed rules and regulations which may be changed from time to time as the best interest of the Town demand.

1.15. *Eligibility for Sick Leave.* Upon completion of twelve (12) months service in a regular full-time position, an employee shall be eligible to use sick leave.

1.16 *Earning and Accumulation of Sick Leave.* Sick Leave shall be earned at the rate of one year, but not used may be accumulated up to a maximum of twelve (12) days.

1.17 *Use of Sick Leave.* An employee shall be granted sick leave for the following reasons:

a. Personal illness of the employee, including inability to work due to pregnancy, childbirth, or related medical conditions.

b. Personal physician and dental appointments.

c. Illness arising from exposure to contagious disease endangering the health of the employee.

d. Illness in the employee's immediate family which necessitates his or her absence from work. In this case "immediate family" shall be defined as the employee's spouse, children and parents.

e. Death of the employee's spouse, child, parent, parent-in-law, sister or brother, (Total absences allowed un-

der Section (d) and (e) above combined shall not exceed six (6) days in any calendar year).

1.18 *Proof of Illness.* An employee who is absent on sick leave continuously for a period of five (5) work days or more shall submit a doctor's certificate or other written evidence to substantiate the sick leave usage. Such certification shall include the diagnosis, confirmation that the diagnosed condition renders the employee incapacitated to perform duties, and the probable period of such incapacitation. However, the department head or the council may require such certification to substantiate sick leave claims of less than five (5) days.

1.19 *Restrictions of Sick Leave.*

a. An employee shall not earn sick leave during a leave of absence without pay, a suspension, or when the employee is otherwise in a non-pay state for more than fifteen (15) calendar days in a month. An employee currently using supplemental sick leave shall not earn additional vacation or sick leave during the period when he is on supplemental sick leave.

b. Sick leave shall not be granted an employee whose absence from duty is a result of his own misconduct. Absence for such cause shall be reported as absence without leave, and shall subject the employee to disciplinary action.

c. Sick leave shall not be granted an employee whose absence from duty is caused by injury or disability sustained as a result of his engaging in employment outside the employment of the Town of Morris.

1.20 *Supplemental Sick Leave.* An employee who by personal illness has exhausted his accumulated sick leave, may, upon approval by the Council be granted supplemental sick leave. Every application for such allowance shall be supported by the certificate of a licensed physician and by such other proof of disability as the Council or Mayor may deem necessary.

1.21 *Injury with Pay Leave.* An employee who sustains a disabling injury without fault or negligence on his part while performing the duties of his position may be granted leave with pay by the Council. Each application for such leave shall contain a statement by the employee and affirmed by his supervisor setting forth the details of the accident in writing, and supported by a doctor's certificate setting forth the nature and extent of the injury and the probable period of disability. In those of Alabama Workmen's Compensation Law, the leave with pay benefit provided by this rule shall be complementary to said workmen's compensation benefit subject to the following limitations. The amount of such complementary benefit shall equal the difference between the amount of workmen's compensation and the amount to which the employee would have been entitled under this rule. In no case shall the total amount of benefits, taking into account the workmen's compensation benefit and the benefit provided by this rule, exceed the base salary amount established in the Town of Morris pay plan for the period during which disability exists.

1.22 *Overtime.* Overtime work shall be authorized only in the following cases:

a. In the event of fire, flood, catastrophe, or other unforeseeable emergency.

b. Where a work station must be manned and another employee is not available for work.

c. To provide essential services when such services cannot be provided by over-lapping work schedules.

d. To carry on short range projects in which the utilization of present employee is more advantageous to the agency than hiring additional personnel.

e. In general, no employee shall be regularly scheduled to work overtime. Exceptions based on seasonal variations in work programs, shall be required when approved by the appointing authority.

f. Overtime shall be defined as any work performed by a permanent employee exceeding the normal work week called for in the pay plan, when such work is assigned by an authorized superior.

g. In the event an employee is required to work on a recognized legal holiday the employee shall be awarded 8 hours overtime.
   1. If the holiday falls on an employee's regularly scheduled off day the employee shall be awarded 8 hours regular time.
   2. Employees working less than 40 hours per week are considered part-time and will not be paid for holidays.

h. *Methods for Awarding Overtime.* Overtime may be awarded by either payment on the basis of hourly equivalent as set forth in the pay plan, based on current hourly pay step of the employee or granting equivalent time off. The governing body, that body which has the authority to levy taxes and adopt the budget for the jurisdiction, shall determine whether overtime shall be awarded by payment or by granting equivalent time off, subject to the limitations in the following rules. The governing body may elect to pay or grant time off above the straight time rate, but must uniformly do so with each employee.

i. A maximum limitation of 16 hours overtime is hereby set. Any employee accrual of overtime in excess of this amount shall within the following month be disposed of by either payment at the current hourly rate or by granting compensatory time off.

j. *Reporting and Payment.* The Town Council reserves the right to make final disposition of all payments for overtime and to periodically conduct reviews of departmental practices of granting overtime.
   1. Each department shall, at regular monthly intervals, post a list at each work station recapping the

current total balance of accrue overtime leave for each employee.

1.23 *Jury Leave.* An employee summoned for jury duty or as a witness in court, shall be granted leave with pay.

1.24 *Leave of Absence Without Pay.* Leaves of this nature shall be submitted to the Mayor for his considerations.

1.25 *Resignation and Retirement.* An employee with permanent status who wished to resign or retire from his position in good standing shall submit his notice in writing to the Mayor not less than fifteen (15) days prior to the effective date. Under unusual conditions, the Mayor may reduce the required number of days notice. A permanent employee separating or retiring from the employment of the Town in good standing shall receive terminal pay for his accrued vacation not to exceed ten (10) days.

1.26 *Maternity Leave.* Expectant mothers are allowed to continue working as long as they and their supervisors feel that they can adequately perform their duties without endangering her health. When the mother-to-be can no longer work, she may either resign or, if she has permanent status, request a maternity leave of absence without pay not to exceed (90) days.

1.27 *Military Service Leave.* Permanent employees of the Town of Morris who serve in military service may petition the Council for a leave of absence.

1.28 *Pre-Induction Physical Examination Leave.* An employee of permanent nature shall be allowed up to one full day for the purpose of taking a pre-induction physical examination when such examination is ordered by the Selective Board.

1.29 *Probationary Period.* The probationary period for new employees will be a period of six (6) months. This is a wording [sic] test period for both you and your supervisor. When the employee completes this initial stage of employment, he will attain permanent status. This means that you have a right to hold your job perma-

nently, conditioned upon your continued satisfactory performance, honesty, loyalty and the Town's ability to finance services, not following these specifications, employee is subject to dismissal at anytime.

1.30 *Reimbursement of Monies.* Any employee whose job requires special job braining and the expense of the training is incurred by the Town, the employee will be required to work for a twelve (12) month period. If the employee leaves the employment of the Town prior to the twelve (12) month period, the employee will be responsible for reimbursement of funds spent for his job training.

1.31 *Dismissal and Demotion.* Notice of dismissal or demotion shall be in writing and shall set forth:

a. The cause of action

b. The date of dismissal or demotion is to become effective.

c. Any other information deemed appropriate.

1.32 *Suspension.* The Mayor may suspend, for improper behavior and without pay, any employee. (In the event such suspension or suspensions do not exceed an aggregate of five (5) calendar days as a singular offense or ten (10) days cumulative in any year of service, the employee shall not have the right of hearing. Should the suspension or suspensions exceed the five day limitation for a single offense or ten day cumulative limitation, a permanent employee shall have the right of appeal). Such suspension shall be effective by service upon the employee by the Mayor. The suspended employee shall have a right to file an answer with the Mayor and Council.

1.33 *Appeal.* An employee with permanent status shall have the right to appeal disciplinary action of dismissal, demotion or suspension. An employee desiring to appeal shall with ten (10) days after notice thereof, file with the Council a written answer to the charges and request a hearing. Such answer shall contain:

a. The reason of dismissal, demotion or suspension

b. An admission of denial or guilt.

c. Reasons why the dismissal, demotion or suspension should not take effect.

1.34. *Hearing.* The Council shall order a public hearing of such charges. The hearing shall be for the purpose of determining whether or not the employee, by reason of his act or acts as charged and his records of service, retention in the employment of the Town or should be removed there from or otherwise disciplined; and to that end the Council shall not be bound by the technical rules of evidence, but shall diligently seek all of the information and evidence bearing on the merits of the case. Either partly interested may be represented by cause. The hearing may be before the Council or a Hearing Officer appointed by the Council. If the matter heard by a Hearing Officer appointed by the Council, he shall take testimony offered in support and denial of such charges and from the same submit to the Council, within five days, a finding of facts and law involved and a recommended decision. The Council at its next regular or special meeting shall consider said report and modify, alter, set aside or affirm said report and certify its findings to the Mayor who shall forthwith put the same into effect.

1.35 *Witnessed.* It shall be the duty of the Mayor to subpoena witnesses other than character witnesses, for or against the employee upon written request and affidavit that their testimony is necessary. Employees shall be required to attend and testify without subpoena.

1.36 *Decision.* The Council shall render its decision with ten (10) calendar days after the conclusion of the hearing which shall forthwith be certified to the Mayor and enforced by him. Copies of the decision shall be delivered to all other parties at interest. The Council may rescind, modify or increase the penalty imposed by the Mayor as warranted by the facts adduced at the hearing.

1.37 *Record of Testimony.* The Council may require that testimony introduced at hearings be recorded but same shall not be transcribed except upon further order.

1.38 *Citizens May File Charges.* Any person who desires to file charges against an employee shall file such charges in writing and shall recite therein the specific act or acts of the employee constituting such cause. The Mayor shall serve a copy of the charges on the accused employee and shall fix a day for the hearing. The accused employee shall, within five (5) calendar days after service, file a written answer to the charges. Failure on the part of the accused employee to file such answer shall be deemed an admission of the truth of such charges without further investigation or hearing on the part of the Council or Mayor. If the hearing is held before the Council, the testimony shall be recorded.

1.39 *Charges Filed by the Mayor.* An employee may also be dismissed, demoted, or suspended upon charges made by the Mayor. Charges preferred by the Mayor shall be served on the employee and a public hearing shall be scheduled by the Council within the time and manner prescribed in the preceding rule.

1.40 *Vacation Forfeited.* Any employee who is dismissed for cause shall forfeit all vacation allowances.

1.41 *Judicial Review.* The decision of the Council based upon all proceedings before the Council shall be final subject to appeal by either party to the Circuit Court to review questions of law and the question of whether or not the decision or order of the Council is supported by the substantial and legal evidence. On such appeal the Circuit Court shall review the record and shall affirm, reverse, remand or render said cause. The decision of the Council shall be controlling until reversed on appeal as provided for herein.

1.42 *Other Appeals, Suspensions.* Any employee suspended without right to a hearing before the Council, may ob-

tain a review of his or her suspension by the Mayor by filing with Mayor not more than ten (10) days thereafter a written answer to such charges and a request for such review. A hearing shall be held thereon not more than twenty days thereafter to determine whether such suspension should be rescinded. At any such hearing such employee may be represented by counsel and present relevant testimony. The Mayor may authorize a representative to conduct such hearing and submit within five (5) days thereafter a finding of facts and law together with recommendations to the Council. Within a period of ten (10) days after such hearing the Mayor may rescind all or any part of such suspension. A suspended employee shall be entitled to full salary for any period of suspension rescinded hereunder.

1.43 *Activities Prohibited.* No person shall be appointed or promoted to, or dismissed from any position, or in any way favored or discriminated against with respect to employment because of his/her sex, political or religious opinions or affiliations or race.

a. No person shall seek or attempt to use any political endorsement in connection with any appointment of a position.

b. No person shall use or promise to use, directly, or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt authority or influence, whether possessed or anticipate to secure or attempt to secure for any person an appointment or advantage in appointment to a position or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration.

c. No employee and no member of the Council shall, directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political

organization or purpose, or solicit or take any pay in soliciting any such assessment, subscription or contribution.

d. No person shall solicit any such assessment, subscription or contribution of any employee.

Any officer or employee under the jurisdiction of this Act who violates any of the foregoing provisions of this section shall forfeit his office or position. However, nothing in this provision shall be constructed to deny any employee his rights to associate or be represented by any organization of his choosing nor shall an employee be denied this right to petition his city, state or national government.

1.44 *Conflict of Interest.* In order to avoid a conflict of interest, an appointing authority may require that an employee who wishes to engage in any outside work or activity for personal profit, file a written request setting out the nature of such outside employment. Reasons for rejection of the request shall be limited to whether or not such employment can cause a conflict of interest, or is incompatible with an employee's position in the Town of Morris.

28 U.S.C. § 1257 (3)

State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States,, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

U.S. Const. Art. VI, cl. 2

ARTICLE VI

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 U.S.C. § 1983

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

A-62

Ala. Code § 11-43-160 (1975)

REMOVAL.

Any person appointed to office in any city or town may, for cause, after a hearing, be removed by the officer making the appointment.

The city council may remove, by a two-thirds vote of all those elected to the council, any such person in the several departments for incompetency, malfeasance, misfeasance or nonfeasance in office and for conduct detrimental to good order or discipline, including habitual neglect of duty.

Supreme Court, U.S.
FILED
APR 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1497

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

JIM JOINER; JOHN MILNER

Petitioners,

v.

MAJOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. PETER BOLVIG
Counsel of Record
McDaniel, Hall, Conerly & Lusk, P.C.
Suite 1400 Financial Center
505 North 20th Street
Birmingham, AL 35203
(205) 251-8143

Attorney for Respondents

QUESTIONS PRESENTED

I. Whether the Lower Court's Opinion conflicts with legal precedent that was in effect at the time that the Officers were discharged, including the Opinions of the United States Supreme Court?

II. Whether the United States Supreme Court should grant the Petition wherein the Petitioners now seek to advance arguments not made in the Alabama Supreme Court?

III. Whether the United States Supreme Court should grant the Petition where there are other grounds which support the conclusion reached by the Alabama Supreme Court in this case?

IV. Does the Alabama Supreme Court Opinion in this case have the far reaching effect as claimed by the Petitioners?

PARTIES TO THE PROCEEDING

The Respondents adopt and incorporate the Petitioners' Statement of the Parties to the Proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 13

I. The Lower Court's Opinion does not conflict with legal precedent that was in effect at the time that the Officers were discharged, including the opinions of the United States Supreme Court 14

II. The Petitioners now seek to advance arguments not made in the Alabama Supreme Court 20

III. There are other grounds which support the Alabama Supreme Court's Opinion in this case which may not have been specifically relied upon by the Alabama Supreme Court but were advanced by the Respondents in that Court 20

a. The Officers were given all of the due process required by law even if this Court were to retroactively apply the standards articulated for the first time in *Loudermill* 21

b. Despite the standards articulated for the first time in *Loudermill*, post-deprivation remedies are still sufficient to satisfy due process requirements in this particular case 24

TABLE OF CONTENTS — (Continued)

Page

c. The Officers were merely employees at will and were entitled to no due process under the applicable law 25

IV. Contrary to the Petitioners' contentions, the Alabama Supreme Court Opinion is not as far reaching in effect as they contend 28

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: *Page*

Anderson v. City of Northlake, 500 F.Supp. 863 (8th Cir. 1980) 25

Arnett v. Kennedy, 416 U.S. 134 (1974) 16, 17

Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976) 21

Bishop v. Wood, 426 U.S. 341 (1976) 26, 27

Cafeteria and Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961) 15, 16

Carpenter v. City of Greenfield School District Number 6, 358 F.Supp. 220 (E.D. Wis. 1973) 21

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) ..... *passim*

Goolsby v. City of Montgomery, 805 F.2d 1008 (11th Cir. 1985) 19, 24

Head v. New Mexico Bd. of Examiners In Optometry, 374 U.S. 424 (1963) 20

Lee v. Hutson, 810 F.2d 1030 (11th Cir. 1987) 19, 24

Parratt v. Taylor, 451 U.S. 527 (1981) 19, 24

Reagan v. United States, 182 U.S. 419 (1901) 15

Riley Inv. Co. v. Commissioner of Internal Revenue, 311 U.S. 55 (1940) 21

Roberts v. Joiner, 590 So. 2d 195 (Ala. 1991) 14, 19, 28

Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 15

Wieman v. Updegraff, 344 U.S. 183 (1952) 15

TABLE OF AUTHORITIES — (Continued)

Other Authorities: *Page*

Foster, *Federal Pre-Termination Rights for State Employees: Cleveland Bd. of Ed. v. Loudermill*, 54 U. Cin. L. Rev. 1069 (1986) 18

Gamso, *Tenured Public Employee Entitled to Pre-Termination Hearing Regardless of Statutory Procedures for Dismissal: Cleveland Bd. of Ed. v. Loudermill*, XVIII Tex. Tech. L. Rev. 225 (1986) 18

Howard, *Cleveland Bd. of Ed. v. Loudermill: Procedural Due Process Protection for Public Employees*, 47 Ohio St. L.J. 1115 (1986) 17

McRea, *Loudermill — What Pre-Termination Process is 'Due' Public Employees*, LX Fla. Bar. J. 37 (1986) 17

OPINIONS BELOW

The Respondents adopt and incorporate the Petitioners' statement of the Opinions Below.

JURISDICTION

The Respondents adopt and incorporate the Petitioners' statement of Jurisdiction.

STATUTES INVOLVED

The Respondents adopt and incorporate the Petitioners' statement of Statutes Involved, however, the Respondents state that Alabama Code § 11-43-160 (1975) has no application to the issues currently before the United States Supreme Court.

STATEMENT OF THE CASE

The Respondents take exception to the Petitioners' Statement of the Case insofar as it embellishes the "facts". It would be impossible for the Respondents to specify each "fact" in contention and keep this Brief within the page limitations prescribed. However, the Respondents would generally state that where the Petitioners have asserted facts which are neither supported by reference to a portion of the record nor by a portion of the Appendix or where the Petitioners have supported their contentions by reference to their Complaint which is a part of their Appendix, those facts are generally unsupported by the record in the Court below or are an embellishment of the facts.

Since the central issue in this case involves the procedures afforded the Officers prior to their termination, the Respondents will supplement the Petitioners' Statement of the Case with a more detailed statement of the proceedings leading up to the termination of the Officers with appropriate references to the record in the Court below.

In October of 1983, Mayor Reid prepared a proposed budget for the following fiscal year (1984). (R.T. 189, 471-473.) Joiner was involved in the preparation of the budget with Reid and had input into its contents. (R.T. 190-191). The proposed budget for 1984 included substantial salary raises for the Officers, and Joiner was to be awarded a newly created position of Administrative Assistant. (R.T. 190). The Administrative Assistant position would pay an additional salary in the range of $3,000.00 to $5,000.00. (R.T. 594-595).

The proposed 1984 budget was rejected by the Council. (R.T. 191). The 1984 budget that was ultimately passed did not include the Administrative Assistant position for Joiner, and the proposed raises for the Officers and other Town employees were reduced to 12%. (R.T. 192).

After Reid's proposed 1984 budget did not pass, the Officers discovered that two members of the Council (Peyton and Keith) had purchased tires for their personal vehicles through the Town's account. (R.T. 473-474). Buying tires through the Town's account allowed the individuals to take advantage of the Town's discount, thereby, allowing the individuals to buy the tires at below retail price. The Officers claim that Milner discovered the invoices reflecting that tires had been purchased through the Town's account, and he showed the invoices to Joiner. (R.T. 192-193).

In early December of 1983, Joiner took the invoices and showed them to Mayor Reid. (R.T. 193). Joiner testified that he turned this matter over to the Mayor, because he felt that was the proper means for handling the situation. (R.T. 193). The invoices reflect that Peyton and Keith purchased tires through the Town's account. (Plaintiffs' Exhibit 1 through Plaintiffs' Exhibit 5). In addition to the two Councilmen, however, the invoices also reflect that Bobby Keith, the son of Frank Keith, purchased tires through the Town's account. (R.T. 248). Bobby Keith was not and has never been a member of the Council. (R.T. 248).

Keith and Peyton subsequently took the matter themselves to the State Ethics Commission in Montgomery, Alabama and

to the Jefferson County District Attorney's office. (R.T. 597). They were informed that the matter should be resolved internally by the Town Council. (R.T. 597).

On December 17, 1983, a Saturday, late at night, the Officers called Keith, Peyton, Lollar and Reno at their homes and asked them to come to the Town Hall. (R.T. 76-77, 193-194). The Officers called this meeting to confront Keith and Peyton with the tire situation, and Milner initially informed Keith that he was going to read Keith his rights. (R.T. 78, 194). The meeting generally accomplished nothing, except upsetting the individuals involved. (R.T. 195). The Officers did not consult with Mayor Reid before calling the Councilmen to the Town Hall, nor was Mayor Reid advised of the same in advance of said meeting. (R.T. 194). It is noteworthy that the Officers never made any attempt to question or otherwise pursue Bobby Keith (the non-Councilman) about his purchase of tires. (R.T. 76-77, 193-194).

The next day, on December 18, 1983, the Council met in special session to arrive at a solution to the tire situation. (R.T. 195-196). Generally, the Council agreed that the solution to the problem was to have Peyton and Keith pay the difference between the Town discount and the retail price of the tires, and Peyton and Keith would not approve anymore purchase orders on behalf of the Town of Morris. (R.T. 596; Joint Exhibit 3). Following this meeting, Mayor Reid advised the Officers that the Council had handled the situation, and this was to be the end of the matter. (R.T. 359).

Also, around this same time, there was an incident involving the viewing of some "x-rated" movies in the police department. According to Joiner's testimony, he was in the police office when several unidentified individuals began watching the "x-rated" movies. (R.T. 247-248). Once the movies began, and Joiner saw that they appeared to be "x-rated", he left the office without taking any action to prohibit the viewing of the same. (R.T. 247-248). Subsequently, Mayor Reid became aware of the incident, and in December of 1983, he posted a note on the police office door stating that no further viewing of "x-

rated" movies would be allowed within the department. (R.T. 237).

Subsequent to the rejection of Mayor Reid's proposed 1984 budget, the relationship between the Officers and the Council deteriorated substantially as exemplified by the evidence.

After the proposed budget was rejected, Chambers attempted to talk to Joiner about the various events, but Joiner refused to talk to Chambers responding that he did not have "a damn thing to say" to Chambers. (R.T. 618-619).

During this same time frame, Chambers complained that the Officers were not actively patrolling his skating rink business located in the Town of Morris. There had been no problems patrolling his business before the rejection of Mayor Reid's proposed budget. (R.T. 618-619).

Following the rejection of Mayor Reid's proposed 1984 budget, there was an occasion where Chambers was approached by Milner, and Milner asked if he could discuss some of the events with Chambers. Chambers noted that there appeared to be something irregular on Milner's person, and when he asked Milner about it, Milner produced a tape recorder from his pocket. Chambers suspected that Milner intended to record the conversation. (R.T. 623-624).

There was also an incident in this time frame in which Joiner borrowed Milner's tape recorder and recorded a telephone conversation with Mayor Reid. (R.T. 205-206). Milner knew that Joiner intended to tape Reid's conversation. (R.T. 205-206). Joiner discussed the problems with Reid during the conversation and recorded the same without Reid's knowledge or permission. (R.T. 205-206).

The deterioration of the relationship between the Council and Officers is further exemplified by the fact that the Officers took the position that they were under no obligation to cooperate with Keith or follow his directives. (R.T. 238-240, 338). This is significant, because Keith had been appointed by Mayor Reid as the Councilman responsible for overseeing the operations of the police department. (R.T. 602).

Joiner's own realization of the deterioration of the relationship is exemplified by his testimony that as early as December, 1983, Joiner feared that his job was in jeopardy. (R.T. 234).

On December 27, 1983, the Town Council met in regular session. All Councilmen were present except Reno and Lollar. (Joint Exhibit 4). At this meeting, the November Financial Statement was distributed, and Mayor Reid discussed the financial strain that was afflicting the Town. A motion was made that the Town borrow $8, 500.00 on a ninety-day note to cover payroll expenses. (R.T. 599; Joint Exhibit 4). The motion was unanimously approved by the Councilmen in attendance. (Joint Exhibit 4).

Around the first of 1984, Keith decided to alter the work schedules within the Police Department. (R.T. 620). Both of the Officers resented the schedule changes, and both openly complained that the changes were in retaliation for their involvement in the tire situation. (R.T. 237, 620).

The Council next met in regular session on January 10, 1984. (Joint Exhibit 5). All Councilmen were present with the exception of Lollar. (Joint Exhibit 5). At this meeting, the financial status of the Town was discussed, and a motion was made to lay off Jimmy Traywick (the dispatcher), demote Frankie Witt (a police officer) to the dispatcher position, cut all regular full-time employees' salaries 5%, and thereafter make an in-depth study of finances every thirty days. (R.T. 599; Joint Exhibit 5). The motion was approved by all Councilmen present with the exception of Mayor Reid who voted against it. (R.T. 199, 600; Joint Exhibit 5).

It is noteworthy that the Council's actions affected several individuals who were not involved in the tire situation. Traywick was laid off, Witt was demoted, and the 5% pay cut applied to the City Clerk, Anna Grooms. (R.T. 196-197).

It is also noteworthy that the 5% pay cut, when applied to the previous 12% raise, still left the Officers with a net 7% raise over their 1983 salaries. (R.T. 241).

At the January 10, 1984 Council meeting, the Councilmen present also unanimously approved the use of daily shift reports, and approved the practice of policemen logging in and out of service with the dispatcher and/or clerk while on duty. (Joint Exhibit 5). Chambers explained that he voted in favor of the additional reporting, because there was a perceived need to know where the policemen on duty were at any given time for safety reasons. (R.T. 601-602). A copy of the "Daily Shift Report" and the directive regarding logging in and out of service are attached to the minutes for the January 10, 1984 Council Meeting. (Joint Exhibit 5).

The Officers resented the pay cut and the directives and voiced their opinions that these actions by the Town Council were in retaliation for the Officers' involvement in the tire situation. (R.T. 582, 602-603, 620-621).

The Council next met in regular session on January 24, 1984. (Joint Exhibit 6). All Councilmen, the Officers, members of the public and the press were present at this meeting. (R.T. 201, 325; Joint Exhibit 6). Without any forewarning, Joiner stood up in the Council meeting, before the Council, the members of the public present and the press and read a letter to the Council stating that the recent pay cuts and layoffs were in retaliation for the tire situation. (R.T. 200; Joint Exhibit 6). Joiner knew that the press was present when he read his letter in the meeting. (R.T. 201). Joiner did not advise anyone, including the Council members, that he intended to read the letter prior to reading the same, nor did he show anyone a copy of the letter prior to reading the same in the Council meeting. (R.T. 201).

The Council next met in regular session on February 14, 1984. (Joint Exhibit 7). All Council members were present except Keith and Chambers. (Joint Exhibit 7). Near the end of this meeting, Mayor Reid called upon the members of the public present for any comments concerning the Town, and Milner's wife questioned the Town spending money on the ball park after cutting employees' (including her husband's) salaries. (Joint Exhibit 7). Mayor Reid explained that the

money used for the ball park was derived from a revenue sharing program, and that money was specifically earmarked for the ball park and senior citizen activity. (Joint Exhibit 7).

The Council next met in regular session on February 28, 1984. (Joint Exhibit 8). During this meeting, Chambers questioned the Town paying for full family medical coverage for Joiner. (Joint Exhibit 8). In response to the previous discussions about the financial status of the Town, Chambers had requested Keith to provide Chambers with a full breakdown of the expenses within the police department (Keith was in charge of the Police Department). (R.T. 607-609). When Chambers reviewed the detailed breakdown, he discovered that the Town was paying for full family medical insurance for Joiner. (R.T. 607-609). Chambers recalled that in the January 26, 1982 meeting the Council voted to provide only single coverage health insurance for new employees, effective January 26, 1982. (R.T. 482, 593-594; Joint Exhibit 1). Since Joiner resigned from his position in February of 1982 and was subsequently rehired in March of 1982, Chambers took the position that the Town should not provide him with full family medical insurance. (Joint Exhibit 2, Joint Exhibit 8, Defendants' Exhibit 3). All Councilmen, except Mayor Reid and Lollar, voted in favor of only paying for Joiner's individual medical insurance. (Joint Exhibit 8). Lollar and Reid voted against cutting Joiner's insurance benefit. (R.T. 200, 481).

Subsequent to the action of the Council cutting Joiner's insurance benefit, the Officers again raised the tire situation and accused all Council members of cutting Joiner's insurance benefit in retaliation for the tire incident. (R.T. 582, 621).

Either the last day of February, 1984 or the first day of March, 1988, Joiner moved out of the Town of Morris to Jasper, Alabama. (R.T. 180-181). Joiner explained that he moved and his wife took a job at this time because it was apparent to him that he was going to be terminated. (R.T. 183-184).

The Town Council next met in regular session on March 13, 1984. (Joint Exhibit 9). All Council members and the Officers were present. (Joint Exhibit 9). During this meeting, Mayor

Reid read and discussed "Resolution Number 84-3", which was unanimously approved by the Council. (Joint Exhibit 9). "Resolution Number 84-3" stated as follows:

> WHEREAS, the Council of the Town of Morris recognizes publicly that there is a problem existing between the Police Dept. and the Council members.
>
> WHEREAS, the Council wants to try to resolve the problems as it is detrimental to the operation of the Town.
>
> WHEREAS, the Council is giving two weeks to work the problems out and if a resolution cannot be settled on, then the Council will have to resolve the matter at the next Council meeting.

(Joint Exhibit 9). Joiner and Milner were present at this meeting and heard the Mayor read the Resolution. (R.T. 201-202, 326). The Officers also once again heard the Councilmen discuss the problems between the Council and the Officers. (R.T. 201-202).

After Mayor Reid read "Resolution Number 84-3", and it was unanimously adopted by the Council, Milner asked Mayor Reid to explain the Resolution. (R.T. 327; Joint Exhibit 9). Reid explained that the Council was willing to meet with the Officers within the next two weeks to get any input that the Officers had into finding a solution to the problems, but if no solution was reached by the next Council meeting, then the Council would bring their own solution to the table. (R.T. 327-328; Joint Exhibit 9). The Council agreed to set a meeting date with the Officers to discuss the problems. (Joint Exhibit 9). Milner was not satisfied with Mayor Reid's explanation. (R.T. 328).

On March 15, 1984, the Officers and the Council met in special session to discuss settling the problems that had arisen between the Officers and the Council. (R.T. 202; Joint Exhibit 10). The minutes of the meeting reflect that many problems were discussed by the Council and the Officers including the following: (1) the business of the Town was not being handled

properly; (2) there was a lack of cooperation between the Officers and the Council; (3) Chief Joiner moved out of town to Jasper; (4) Joiner acquired an unlisted phone number at home; (5) Joiner would not answer telephone calls; (6) the Officers failed to get the anticipated raise in salary; (7) bringing television media to the Council meetings was wrong; (8) the tire situation was handled wrong; (9) the Mayor should have handled the tire situation in its entirety; (10) the salary cuts were justified and in the best interest of the Town; (11) the method for preparation and approval of the 1984 budget should have been handled differently; (12) feelings were hurt on both sides; (13) misunderstandings and misinformation were contributing to the problems between the Council and the Officers, and (14) a new procedure needed to be devised for following up on outstanding bonds from court work. (Joint Exhibit 10). Joiner admits that during this meeting he advised the Council that he would not be satisfied under any circumstances until he got back his 5% raise and his full family insurance benefits, and he further stated that the problems between the Council and the Officers were not going to go away until he got them back. (R.T. 129, 204-205). Milner claims that he was told to sit down and shut up during the course of this meeting. (R.T. 204, 239). Notably, this is the *only* meeting where Milner claims he was prevented from speaking, and Joiner does not claim that he was ever prevented from speaking. (R.T. 331). The Councilmen deny that Milner was ever told to sit down and shut up at any meeting, including the March 15, 1984 meeting. (R.T. 488, 613). During this meeting, the Officers did not advise the Council that they intended to file a lawsuit against the Council members in the near future. (R.T. 206).

On March 23, 1984, eight days following the special session, the Officers filed suit against the Council. (R.T. 206; Defendants' Exhibit 1). The Officers' Complaint named each and every one of the Council members in their official capacities and also named Keith and Peyton in their individual capacities as well. (Defendants' Exhibit 1). The Complaint alleges that

the pay cuts, reduction of Joiner's insurance benefits, scheduling changes and other changes within the police department were done in retaliation for the Officers' involvement in the tire situation. (R.T. 207-208; Defendants' Exhibit 1). The Complaint states four counts, each seeking $250,000.00 in damages against each and every one of the Council members regardless of whether the individual Council member had voted in favor of the Officers on any particular issue or whether the individual Council member was even present at any particular meeting. (R.T. 206-207; Defendants' Exhibit 1).

The Council next met in regular session on March 27, 1984. (Joint Exhibit 11). All Council members and the Officers were present at this meeting. (R.T. 613-614; Joint Exhibit 11). During the course of this meeting, the problems between the Officers and the Council were again discussed, and Reno, Chambers and Peyton all made comments regarding the same. (R.T. 330-331, 614; Joint Exhibit 11). The Officers were given an opportunity to respond, but Milner made no comment. (R.T. 330, 316-314).

Immediately following the regular session on March 27, 1984, the Council met in a special session to further discuss a resolution to the problems between the Officers and the Council. (Joint Exhibit 11). During this meeting, the Council discussed the fact that they had previously agreed to give the Officers two weeks to work out the problems, and if no agreement was reached between the parties, then concrete action was to be taken at the March 27, 1984 regular session. (Joint Exhibit 11). The Council noted that no agreement had been reached between the parties, and since their last meeting, the Officers had filed their previously referenced lawsuit. (Joint Exhibit 11). The Council further discussed that the situation between the Council and the Officers was hindering their ability to give the Town the services it deserved. (Joint Exhibit 11). At the conclusion of this meeting, the Council agreed to meet again on March 29, 1984 to make a final decision about what action to take to end the problems between the Council and the Officers. (Joint Exhibit 11).

The Council next met in special session on March 29, 1984 for the purpose of arriving at a solution to the problems existing between the Officers and the Council. (Joint Exhibit 12). Prior to this meeting, Joiner heard that the Council had made up its mind to terminate him at this meeting. (R.T. 235). All Council members and the Officers were present at this meeting. (R.T. 210-211; Joint Exhibit 12). News reporters and television cameras were also present at this meeting. (R.T. 216, 618).

Mayor Reid opened the meeting by explaining that the purpose of the meeting was to resolve the conflict between the Officers and the Council. (Joint Exhibit 12), He explained that the matter was open for discussion, and any and all opinions on the subject would be welcomed. (Joint Exhibit 12). He advised that Council members would speak first and then anyone else could speak. (Joint Exhibit 12). During this meeting, the Councilmen stated that they had met with the Officers in an attempt to work things out, but it now appeared that any decision made by the Council members would be overshadowed by the threat of a lawsuit, and the day-to-day business of the Town was not being properly conducted as a result of the deteriorated relationship between the Council and the Officers. (Joint Exhibit 12). Joiner and Milner were in attendance at this Council meeting and were given an opportunity to be heard. (R.T. 215; Joint Exhibit 12).

During the meeting, several citizens spoke on the subject of various complaints. (R.T. 211, 333; Joint Exhibit 12). Generally the citizens backed the Council, did not like the adverse publicity that the Town had received as a result of the way the Officers had handled the tire situation and objected to the showing of x-rated movies in the police department. (R.T. 333-334; Joint Exhibit 12).

During this meeting, both Officers were present and given an opportunity to respond to the various complaints. (R.T. 615).

Mayor Reid read a statement concerning the matter, stating that the situation had severely hampered the day-to-day opera-

tion of the Town's business, and that in light of the situation, he recommended the Officers resign. (Joint Exhibit 12). He further recommended that the Officers should be terminated if they chose not to resign. (Joint Exhibit 12).

Mayor Reid called upon the Officers to make any comments or present their side of the story. (R.T. 216). Joiner responded that he would not resign, because he had done nothing wrong. (R.T. 222). Milner's only comment was that he would not resign, although his wife was present and did speak out in defense of her husband. (R.T. 211, 334).

After the Officers refused to resign, the Council voted to adopt the Resolution of Mayor Reid. All Councilmen voted in favor of terminating the Officers with the exception of Keith and Peyton who abstained from voting. (R.T. 222, 338; Joint Exhibit 12).

The Council members who voted in favor of the termination were in no way involved in the tire incident. (R.T. 223). Furthermore, Chambers, who voted in favor of termination, testified at trial that he did not get along with Peyton and Keith anyway, and they would not have been able to influence his vote. (R.T. 592, 624-625).

Following their termination, the Officers had a right to a post-termination hearing under the "Town of Morris Personnel Policy". (R.T. 584; Plaintiffs' Exhibit 6). The Officers were sent letters advising them that their termination would be effective immediately, and that the grounds for their dismissal were those stated in the previous meeting. (R.T. 224; Defendants' Exhibit 4). The letter further advised them that a more detailed statement of the charges would be made available upon request. (Defendants' Exhibit 4).

Neither of the Officers requested a more detailed list of charges, nor did they seek any post-termination hearing as provided for under the "Town of Morris Personnel Policy". (R.T. 226, 623). It is noteworthy that Frankie Witt, the officer who was demoted to dispatcher, was represented by the same attorney that represented Joiner and Milner. (R.T. 622-623).

Subsequent to the adverse action by the Council, Witt requested a post-deprivation hearing under the Personnel Policy. (R.T. 622-623). Witt, who was represented by the same attorney representing the Officers, was given a post-deprivation hearing in accordance with the "Town of Morris Personnel Policy" on January 26, 1984. (R.T. 622-623; Joint Exhibit 6).

Instead of seeking a post-termination hearing under the "Town of Morris Personnel Policy" the Officers merely amended their Complaint to allege that, in addition to the previous actions of the Council, the Council's termination of the Officers was in retaliation for the Officers' involvement in the tire situation. (R.T. 226, 623; C.R. 15).

REASONS FOR DENYING PETITION

The Respondents respectfully state that this Court should deny the Petition on both jurisdictional and procedural grounds. Specifically, the Respondents state that the reasons for denying the Petition include: (1) that the Alabama Supreme Court Opinion does not conflict with legal precedent, including this Court's opinions, that were in effect at the time the Officers were terminated; (2) that the Petitioners now seek to advance arguments not made in the Court below; (3) that there are legal grounds to support the Alabama Supreme Court's opinion other than those specifically relied upon by the Alabama Supreme Court but advanced by the Respondents in that Court, and (4) that the Alabama Supreme Court opinion does not have the potential far reaching effect as claimed by the Petitioners. Each of the above-said grounds for denying the Petition will be discussed with more specificity in the following separately enumerated sections of this Brief.

I.

THE LOWER COURT'S OPINION DOES NOT CONFLICT WITH LEGAL PRECEDENT THAT WAS IN EFFECT AT THE TIME THAT THE OFFICERS WERE DISCHARGED, INCLUDING THE OPINIONS OF THE UNITED STATES SUPREME COURT.

It is important to note that the Petitioners did not present an argument that the Alabama Supreme Court should retroactively apply *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) in the proceedings below. *Roberts v. Joiner*, 590 So. 2d 195, 198 (Ala. 1991). The Officers were terminated on March 29, 1984 prior to the release of *Loudermill*. Therefore, the issue of what process was due the Petitioners was correctly resolved by the Alabama Supreme Court analyzing legal precedent that was in force and effect at the time the Officers were terminated.

The Petitioners attempt to circumvent this flaw in the procedural history of this case by citing several of this Court's opinions preceding *Loudermill* and representing to this Court that those opinions held that employees with a proprietary interest in their jobs are entitled to pre-termination notice and a pre-termination hearing under the due process requirements of the Fourteenth Amendment. Thus, the Petitioners further argue that *Loudermill* need not be retroactively applied, because *Loudermill* did not establish a new principle of law but merely restated a principle of law which had been previously established in this Court's opinions. The Respondents shall demonstrate in this section of the Brief that this aspect of the Petitioner's argument is without merit, and that the Alabama Supreme Court opinion does not conflict with the applicable legal precedent at the time that the Officers were terminated.

First, it should be noted that contrary to the Petitioner's contention, not a single pre-*Loudermill* case cited by the Petitioners "held that an individual with a property interest in his employment is entitled to receive notice of charges against him and a hearing on the charges prior to being discharged".

Petition for Writ of Certiorari, Page 16. The Petitioners would lead this Court to believe that the above-said opinions clearly held that the due process requirements of the Fourteenth Amendment require that the Officers receive pre-termination notice and a pre-termination hearing, but as can be seen from a cursory review of the decisions, such is not the case.

The fallacy of this aspect of the Petitioners' argument is further demonstrated by a brief historical summary of this Court's opinions leading up to the opinion in *Loudermill*.

In the beginning, this Court held that public employees did not have a proprietary interest in employment and were nothing more than employees at will. Thus, in early cases, the Court held that a public employee was afforded no Constitutional protection. *Reagan v. United States*, 182 U.S. 419 (1901).

It was not until the mid 1950's that the Court began to recognize that a public employee might be entitled to some degree of Constitutional protection. *Wieman v. Updegraff*, 344 U.S. 183(1952) and *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

At this point in history, however, the Court had only begun to consider the extent of Constitutional protection. The Court had yet to articulate the extent of Constitutional protection afforded a public employee and certainly had not gone as far as holding that the due process requirements of the Constitution required pre-termination notice and a pre-termination hearing.

In fact, the Court refused to hold that due process requirements of the Constitution required pre-termination notice and a pre-termination hearing in at least two cases prior to *Loudermill*.

The first such case is *Cafeteria and Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886 (1961). In *McElroy*, the commander of a military installation effectively discharged a civilian employee who worked on the military installation without any prior notice or opportunity to be heard. While the commander cited security reasons for denying the employee access

to the base, he would not elaborate on his reasons any further and denied the employee any opportunity (either before or after termination) to be heard on the charges stating that such a meeting would serve no useful purpose. In examining the issue of whether the commander's actions violated the due process requirements of the Constitution, the Court stated:

> The Court has consistently recognized that an interest closely analogous to Rachael Brawner's, the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. (Citations omitted)
>
> . . .
>
> Nothing that was said or decided in *United Public Workers* or *Wieman* would lead to the conclusion that Rachael Brawner could not be denied access to the Gun Factory without notice and an opportunity to be heard. Those cases demonstrate only that the State and Federal Governments, even in the exercise of their internal operations, do not Constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exists Constitutional restraints upon State and Federal governments in dealing with their employees is not to say that all such employees have a Constitutional right to notice and a hearing before they can be removed.

McElroy at 896-898. Thus, the Court held that the employee was not entitled to pre-termination notice or a hearing of any kind (either before or after the effective discharge).

The Court again examined this issue in *Arnett v. Kennedy*, 416 U.S.. 134 (1974) and once again refused to hold that the due process clause of the Constitution required pre-termination notice and a pre-termination hearing. Justice Rehnquist, writing for the plurality, held that an employee terminated for

criticizing other employees could be terminated without pre-termination notice and a pre-termination hearing.

Arnett continued to be valid law until the Court next addressed this issue in *Loudermill.*

As can be seen from the foregoing brief historical summary of the Court's Opinions dealing with this issue, *Loudermill* clearly established a new principle of law by establishing for the first time that the due process clause of the Constitution requires pre-termination notice and an opportunity to be heard before a public employee with a proprietary interest in continued employment can be discharged.

If Petitioners' argument is correct, then *Loudermill* is a relatively insignificant opinion doing nothing more than restating an already clearly defined principle of law. Legal commentators notably disagree with this view.

> Although supported by plurality of only three Justices, Justice Rehnquist's Opinion in *Arnett* governed the procedural due process rights of public employees until the Court's recent Decision in *Cleveland Board of Education v. Loudermill.*

Howard, *Cleveland Bd. of Ed. v. Loudermill: Procedural Due Process Protection for Public Employees,* 47 Ohio St. L.J. 1115 (1986).

> Given the sharply divided nature of the *Arnett* Court, considerable doubt remained as to whether and when due process requires a pre-termination hearing. This uncertainty lead to an inconsistency in judicial decisions dealing with pre-termination due process and a corresponding lack of predictability for both public employers and their employees. It was not until more than ten years later, in *Cleveland Board of Education v. Loudermill,* that the Supreme Court again directly addressed the issue of the pre-termination process due public employees.

McRea, *Loudermill — What Pre-Termination Process is 'Due' Public Employees,* LX Fla. Bar. J. 37 (1986).

> Before *Loudermill*, it was not clear whether the principle that one had to take the bitter with the sweet would be applied to efforts to establish a due process violation of a property right. It was known neither when a hearing had to be held if the government tried to infringe on a protected property right, nor what sort of hearing was actually to be required if such an infringement was contemplated.

Gamso, *Tenured Public Employee Entitled to Pre-Termination Hearing Regardless of Statutory Procedures for Dismissal: Cleveland Bd. of Ed. v. Loudermill*, XVIII Tex. Tech. L. Rev. 225 (1986). "

> The Supreme Court had yet to definitely come to grips in these prior decisions with the issue of whether or not a state could create a limited property interest in employment — limited, that is, by the statutory procedures enacted for its deprivation — or whether a property interest once conferred was subject to Federal Constitutional considerations regardless of any statutorily imposed limitations. In the case under consideration, *Cleveland Board of Education v. Loudermill*, however, the Court laid this question to rest. In an 8-1 decision, the Court held that property interests, once conferred, are subject to Constitutional protections and that only nonproperty expectations in employment can be limited by State procedural regulations.
>
> . . .
>
> *Even more dramatically, the Court in Loudermill declared for the first time that State employees with property interest in continued employment have a Constitutional due process right to "some kind of hearing" prior to discharge.*

Foster, *Federal Pre-Termination Rights for State Employees: Cleveland Bd. of Ed. v. Loudermill*, 54 U. Cin. L. Rev. 1069 (1986) (emphasis added).

The commentary above clearly demonstrates that the Plaintiff's argument is erroneous, and under the circumstances, the Alabama Supreme Court was correct in utilizing

pre-*Loudermill* precedent to analyze this case. Furthermore, it is clear that the Alabama Supreme Court Opinion in this case does not conflict with pre-*Loudermill* precedent.

As noted by the Alabama Supreme Court, the problems between the Officers and the Town Council were discussed not at one, but several, meetings prior to their termination. The Officers attended these meetings and were given an opportunity to speak, and in fact did speak, to the problems at several of these meetings. *Roberts v. Joiner*, 590 So. 2d 195, 197 (Ala. 1991). Furthermore, after they were terminated, the Officers were entitled to written notice setting forth the reasons for termination and a formal hearing. The hearing could be either before the Town Council or an appointed hearing Officer, and the Officers had the right to representation by an attorney and a right to call witnesses and present evidence at the hearing. Subsequent to that hearing, the Officers further had the right to have any adverse decision reviewed by the Circuit Court. *Roberts*, at 201. Instead of pursuing these post-termination remedies, the Officers elected to merely amend their already pending lawsuit. *Roberts*, at 201.

The evidence clearly demonstrates that the Officers were afforded process both before and after their termination.

As stated above, at the time the Officers were discharged, this Court had never gone as far as holding that an employee with a proprietary interest in his job was entitled to pre-termination notice and a hearing. Furthermore, as noted in the Alabama Supreme Court Opinion in this case, this Court's Opinion in *Parratt v. Taylor*, 451 U.S.. 527 (1981) supports the Alabama Supreme Court's Opinion. "The legacy of *Parratt* and its progeny is that such unauthorized conduct, as the Plaintiff complains of in this case, can be cured by various post-deprivation remedies which can be provided by the State." *Goolsby v. City of Montgomery*, 805 F. 2d 1008, 1011 (11th Cir. 1986) and *See also Lee v. Hutson*, 810 F. 2d 1030 (11th Cir. 1987). In this case, it is clear that the Officers do not attack the procedures afforded per se, but attack the application of the procedures and the conduct of the individual councilman in their specific

case. Under the Officer's theory, it is clear that post-deprivation remedies available to the Officers both in the "Town of Morris Personnel Policy" and under the applicable Alabama case law satisfy the due process requirements of the Fourteenth Amendment as articulated in the pre-*Loudermill* case law.

II

THE PETITIONERS NOW SEEK TO ADVANCE ARGUMENTS NOT MADE IN THE ALABAMA SUPREME COURT.

Although the Petitioners state that they are not asking the Court to retroactively apply *Loudermill,* their argument implicitly invites the Court to do so. *Loudermill* is the only case cited by the Plaintiffs which supports their contention that the Plaintiffs were entitled to pre-termination notice and a pre-termination opportunity to be heard.

As noted above, the Petitioners did not request the Alabama Supreme Court to retroactively apply *Loudermill,* and therefore, this Court should refrain from applying the standards articulated in *Loudermill* to the case at bar. The Petitioners are not allowed to assert new legal arguments at this stage in the litigation. *Head v. New Mexico Bd. of Examiners in Optometry,* 374 U.S.. 424, 432 (1963).

III.

THERE ARE OTHER GROUNDS WHICH SUPPORT THE ALABAMA SUPREME COURT'S OPINION IN THIS CASE WHICH MAY NOT HAVE BEEN SPECIFICALLY RELIED UPON BY THE ALABAMA SUPREME COURT BUT WERE ADVANCED BY THE RESPONDENTS IN THAT COURT.

Where the decision of the lower court is correct in result, it must be affirmed by the appellate court, even though the

lower court may have reached the result on erroneous grounds. *Riley Inv. Co. v. Commissioner of Internal Revenue*, 311 U.S. 55, 59 (1940). In this section of their Brief, the Respondents shall demonstrate that the result reached in the Alabama Supreme Court was the correct result for a number of reasons, even though the Alabama Supreme Court may not have specifically relied upon the arguments herein below. It should be noted that each of the following arguments were advanced by the Respondents in the Alabama Supreme Court.

A. *The Officers were given all of the due process required by law even if this Court were to retroactively apply the standards articulated for the first time in* Loudermill.

Assuming for the sake of argument that *Loudermill* is to be applied retroactively, and the Officers were entitled to pre-deprivation notice and a hearing, it is clear that the Officers were nonetheless afforded all of the due process required by law. All that *Loudermill* requires is notice of a reason for discharge and some sort of hearing affording the Officers an opportunity to be heard. There is no requirement that the Officers be given notice of and an opportunity to be heard upon all reasons for dismissal. As long as the Officers were given notice of and an opportunity to be heard on any reason justifying dismissal, that satisfies the due process requirements of the Fourteenth Amendment. *Carpenter v. City of Greenfield School District Number 6*, 358 F.Supp. 220 (E.D. Wis. 1973). Nor is there any requirement that the board making the decision be the same board which held the "hearing" or heard the evidence. *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976). The "hearing" need not be a formal trial, and the notice need not be in writing.

In the case at bar, it is clear that the Officers were repeatedly advised and warned of the Council's opinion that the Officers had various problems and in particular with the Officers' performance of their duties. (R.T. 202-205, 210-223, 325-335,588; Joint Exhibits 4 through 12).

The problems with the police department and the Officers were discussed by the Town Council on no less than four separate occasions. On each of these occasions, the Officers admit that they were present, and heard the substance of the complaints. At each of these meetings, the Officers acknowledge that they were given an opportunity to respond (with the exception of the March 15, 1984 meeting in which Milner claims that he was told to sit down and shut up). (R.T. 202-205, 210-223, 325-335, 588; Joint Exhibits 4 through 12).

On March 13, 1984, Mayor Reid proposed a resolution acknowledging that a problem existed between the Town Council and the Officers. That resolution was unanimously passed. The resolution adopted by the Town Council stated as follows:

> WHEREAS, the Council of the Town of Morris recognizes publicly that there is a problem existing between the Police Dept. and the Council members.
>
> WHEREAS, the Council wants to try to resolve the problems as it is detrimental to the operation of the Town.
>
> WHEREAS, the Council is giving two weeks to work the problems out and if a solution cannot be settled on then the Council will have to resolve the matter at the next council meeting.

The Officers were present at this meeting, and John Milner asked Mayor Reid to explain the resolution. Mayor Reid explained that the Council was publicly recognizing that a problem existed between the Council and the Officers, and that the Council was willing to meet with the Officers within two weeks and discuss any possible solutions. If no solution was reached by the next Council meeting, the Council would bring their own solution to the table. The Council agreed to set a meeting date when all parties could discuss the matter. (R.T. 326-328; Joint Exhibit 9).

On March 15, 1984, the Council members met with the Officers in a special meeting to again discuss the problems. Again, both Officers were present at this meeting and heard

the complaints made by the council members. Joiner admits he was given an opportunity to respond, but Milner claims he was told to sit down and shut up at this meeting when he attempted to speak. (R.T. 202-209, 331; Joint Exhibit 10). Mayor Reid and Councilman Chambers deny that Milner was ever told to sit down and shut up or that Milner was ever denied the opportunity to respond. (R.T. 488, 613).

The Town Council met again in regular session on March 27, 1984 and once again discussed the problems. (Joint Exhibit 11). Again, the Officers were present at this Town Council meeting and heard the complaints of the Councilmen. (R.T. 209, 331).

A special session of the Town Council met again on March 29, 1984 for the expressed purpose of arriving at a solution to the problems existing between the Officers and the Town Council. This was an open public meeting, and several members of the community attended and voiced their opinions on the subject. Again, both Officers were present at this council meeting and were given an opportunity to respond to the complaints which were made during the course of the meeting. After the Officers were given an opportunity to respond, the Mayor made a recommendation that the Officers resign, and if they would not resign, then he recommended that the Council terminate both the Officers. Joiner and Milner stated that they would not resign. Councilman Chambers made a motion that the Town accept the recommendation of the Mayor and said motion was unanimously passed with Frank Keith and Earl Peyton abstaining from the vote. Thus, the Plaintiffs were terminated at that meeting. (R.T. 210-223, 331-336; Joint Exhibit 12).

It is clear from the foregoing factual scenario that the Officers were afforded the due process required by *Loudermill* on not one, but several occasions. They repeatedly heard the complaints of the Councilmen and were given an opportunity to respond to the same. Any one of these meetings, in and of itself, is sufficient to satisfy the due process requirements of the Fourteenth Amendment as enunciated by *Loudermill*.

B. *Despite the standards articulated for the first time in* Loudermill, *post-deprivation remedies are still sufficient to satisfy due process requirements in this particular case.*

Furthermore, despite changes in the law, the law still recognizes a situation to this date in which post-deprivation remedies cure any pre-deprivation deficiencies with regard to procedural due process. In *Goolsby v. City of Montgomery*, 805 F.2d 1008 (11th Cir. 1986) and *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987), the Court recognized that there are cases in which post-deprivation remedies satisfy the Due Process Clause. In both of these cases, the 11th Circuit held that a pre-deprivation hearing is required only in those cases where the Plaintiff is attacking state procedures as being violative of due process, and cited *Parratt* to support that conclusion. In both of these cases, the Plaintiffs complained of being discharged without being afforded pre-termination due process. In both cases, the Plaintiff did not challenge the procedures per se, but instead, alleged that the persons responsible for executing the procedures had engaged in unauthorized and wrongful conduct. In *Goolsby*, the Plaintiff complained that he was not afforded the notice required by the procedures and was not given a fair trial. In *Lee*, the Plaintiff complained that the Civil Service Board: (1) "failed to weigh independently the evidence and punishment", (2) "failed to afford her an unbiased panel", (3) "did not make a determination based upon the evidence and arguments presented to it", and "the hearing was a sham", and (4) "failed to state which evidence it relied upon in reaching its decision and the reason for that decision". *Lee* at 1031.

In both *Goolsby* and *Lee*, the 11th Circuit held that "the legacy of *Parratt* and its progeny is that such unauthorized conduct, as the Plaintiff complains of in this case, can be cured by various post-deprivation remedies which can be provided by the State." *Goolsby* at 1011.

Similarly, in the case at bar, the Officers do not challenge the procedures per se, but to the contrary challenge the actions and conduct of the Councilmen themselves in their ex-

ecution of these procedures. It is undisputed that the Officers were present at several meetings at which the Town Council discussed the problems with the Officers, and they were present at the meeting where they were ultimately terminated. (R.T. 202-205, 210-223, 325-335; Joint Exhibits 4 through 12). The Officers complain that the decision making body was biased, and that the reasons given for their discharge were a sham. It is clear that the Officers do not attack the procedures per se, but attack the application of the procedures and the conduct of the individual Councilmen in their specific case. Under this sort of theory, it is clear that the post-deprivation remedies available to the Officers both in the "Town of Morris Personnel Policy" and under the applicable Alabama case law satisfy the due process requirements of the Fourteenth Amendment.

C. *The Officers were merely employees at will and were entitled to no due process under the applicable law.*

The Alabama Supreme Court specifically noted that it did not address the issue of whether the Officers had a proprietary interest in their jobs, but instead resolved the issues by finding that they were given all process due assuming there was a proprietary interest involved. Even though the Alabama Supreme Court did not reach the issue of whether the Officers had a proprietary interest, that issue was raised by the Respondents in that Court and a resolution of that issue supports the result reached in the Court below.

In order to avail themselves of the protection of the Fourteenth Amendment and its due process requirements, the Officers must first prove they have a proprietary interest in continued employment with the Town of Morris. "For due process purposes, to have a cognizable property interest in governmental benefits, it is not enough that the claimant has a demonstrated need for such benefits; rather he must have a legitimate claim of entitlement to them." *Anderson v. City of Northlake*, 500 F.Supp. 863, 865 (8th Cir. 1980).

Applicable State Law is to be applied in addressing this threshold question. *Bishop v. Wood*, 426 U.S. 341 (1976). In this case, the laws of the State of Alabama should be applied to determine whether the Officers have met their initial burden of proving that they have a proprietary interest in continued employment with the Town of Morris.

In the trial of this case, the Officers relied upon § 1.29 of the "Town of Morris Personnel Policy", which states as follows:

> *Probationary Period.* The probationary period will be a period of six (6) months. This is a wording (working) test period for both you and your supervisor. When the employee completes this initial stage of employment, he will attain permanent status. This means you have a right to hold your job permanently, *conditioned upon your continued satisfactory performance, honesty, loyalty, and the Town's ability to finance services; not following the specifications, employee is subject to dismissal at any time.*

(C.R. 207-217; plaintiffs' Exhibit 6, page 4 (Emphasis added)).

In *Bishop v. Wood*, 426 U.S. 341 (1976), the United States Supreme Court addressed a substantially similar situation. Bishop was employed by the City of Marion, North Carolina as a policeman, and after six months, he became a "permanent employee". After he attained his "permanent status", he was discharged by the City. The "Personnel Ordinance of the City of Marion" provided in pertinent parts as follows:

> *Dismissal.* A permanent employee whose work is not satisfactory over a period of time, shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge

> setting forth the effective date and reasons for the discharge if he shall request such a notice.

Bishop at 344.

The policeman contended that his "permanent status" and the provisions pertaining to dismissal in the "Personnel Ordinance" created a proprietary interest in continued employment protected by the Fourteenth Amendment. The Supreme Court noted that although the employee had attained "permanent status", there was nothing setting forth the exact duration of his employment. The Supreme Court held that the provisions of the "Personnel Ordinance" could be fairly read as setting forth the conditions for which an employee's removal would be justified as opposed to creating a proprietary right to continued employment.

As can be seen from a comparison between the "Personnel Ordinance" in *Bishop*, and the "Town of Morris Personnel Policy", the two are strikingly similar. Although the "Town of Morris Personnel Policy" refers to an employee attaining "permanent status", there is no specified duration for employment, and the provision is fairly read to set forth the specifications for discharge as opposed to creating a proprietary interest in continued employment.

Furthermore, the conditions applicable to "permanent status" are so broad that they effectively override any proprietary interest in continued employment that might be created by referring to the employee as attaining "permanent status". The effect of these broad conditions is to make the Officers nothing more than employees at will under the applicable Alabama Law. The "Town of Morris Personnel Policy" is insufficient to create a proprietary interest in continued employment under Alabama law.

IV.

CONTRARY TO THE PETITIONERS' CONTENTIONS, THE ALABAMA SUPREME COURT OPINION IS NOT AS FAR REACHING IN EFFECT AS THEY CONTEND.

The Petitioners would have this Court believe that the Alabama Supreme Court Opinion in this case has far reaching effect and will result in the deprivation of procedural due process being afforded to many, if not all, similarly situated employees in Alabama in the future. Such is simply not the case.

The Alabama Supreme Court Opinion itself notes that, "we intend that holding to be construed narrowly." *Roberts*, at 201.

In fact, the Opinion has little, if any, precedential effect. It is clear that the Alabama Supreme Court limited its holding to the particular facts of the case, therefore, the Opinion would only apply to cases where an employee was terminated prior to the release of *Loudermill*, and the employee failed to argue that the standards articulated in *Loudermill* should be retroactively applied. Under the circumstances, it is almost inconceivable that the Alabama Supreme Court Opinion would have any precedential effect on any future or pending litigation.

While the precedential effect of the opinion below is not dispositive of the issue of whether this Court should grant the Petition, it is an important factor to be considered.

CONCLUSION

For the reasons stated hereinabove, the Respondents respectfully state that this Court should deny the Petition.

Respectfully submitted,

C. PETER BOLVIG
Counsel of Record
McDANIEL, HALL, CONERLY
& LUSK, P.C.
1400 Financial Center
505 North 20th Street
Birmingham, AL 35203
205-251-8143

Attorney for Respondents

Supreme Court, U.S.
FILED
MAY 14 1992
OFFICE OF THE CLERK

(3)

No. 91-1497

In The

Supreme Court Of The United States

October Term, 1991

JIM JOINER; JOHN MILNER
Petitioners,

v.

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. DANIEL EVANS
Counsel of Record
1736 Oxmoor Road, Suite 101
Birmingham, Alabama 35209
205/870-1970

GARY P. CODY
MICHAEL J. EVANS
Longshore, Evans & Longshore
1900 City Federal Buildin
2026 Second Avenue North
Birmingham, Alabama 35203
205/252-7661

Attorneys for Petitioners

QUESTIONS PRESENTED

I. Whether the Alabama Supreme Court's decision conflicts with the decisions of the United States Supreme Court applicable to the discharge of petitioners from their tenured public employment without notice or a hearing?

II. Whether petitioners now seek to advance arguments that were not made to the Alabama Supreme Court?

III. Whether there are other grounds, not asserted or relied upon by the Alabama Supreme Court in its decision, which would support that decision and thereby justify the denial of the Petition?

IV. Whether the Alabama Supreme Court's decision has a broad and limiting effect upon due process of law by imposing upon the petitioners, and all other citizens of Alabama seeking redress under 42 U.S.C. § 1983, the impermissible requirement of exhaustion of administrative remedies that may be provided or required by state law or municipal ordinance?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the Petition, and the respondents have adopted the petitioners' listing of the parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iii

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), Did Not Expand or Substantively Change the Law Applicable to Petitioners' Due Process Claims, and *Parratt v. Taylor*, 451 U.S. 527 (1981) Was Not Legal Precedent With Respect to Petitioners' Due Process Claims 4

II. Assuming, *Arguendo*, That This Court's Decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) Changed the Law With Respect to Due Process in the Discharge of a Tenured Public Employee, Petitioners Cited and Argued *Loudermill* in the Appeal to the Alabama Supreme Court and, Therefore, Are Not Presenting Arguments to This Court That Were Not Made to the Alabama Supreme Court 7

III. The Other Grounds Cited by the Respondents are Not Supported by the Applicable Law and Facts of the Action Below and, Therefore, Those Grounds Do Not Support the Decision of the Alabama Supreme Court 8

A. Respondents did not notify petitioners of the charges against them, nor provide them an opportunity to respond to the charges, prior to discharging them 9

TABLE OF CONTENTS — (Continued)

Page

B. *Loudermill* did not "articulate for the first time" the applicable standards of due process, nor were the post-deprivation remedies adequate to provide due process 9

C. Under the provisions of state and federal law, and the express terms of respondents' written personnel policy, petitioners were tenured public employees who had a property interest in their jobs and were not employees at will 9

IV. The Decision of the Alabama Supreme Court Adversely Impacts All Alabama Tenured Public Employees Because It Authorizes the State of Alabama and Its Political Subdivisions to Discharge Tenured Employees Without First Providing Them Notice of the Charges Against Them and an Opportunity to Respond to the Charges 10

CONCLUSION 11

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: *Page*

Bell v. Burson, 402 U.S. 535 (1971) 5, 9

Bishop v. Wood, 426 U.S. 341, 349-50 (1976) 7

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 5, 9, 10

Boddie v. Connecticut, 401 U.S. 371 (1971) 5, 9

Cafeteria and Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961) 6

City of Huntsville v. Biles, 489 So.2d 509 (Ala. 1986) 10

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 4, 5, 6, 7, 8, 9

Davis v. Scherer, 468 U.S. 183 (1984) 5

Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987) 10

Godwin v. City Council of the City of McKenzie, 449 So.2d 1231 (Ala. 1984) 10

Goolsby v. City of Montgomery, 805 F.2d 1008 (11th Cir. 1986) 6

Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 434 (1963) 8

Lee v. Hutson, 810 F.2d 1030 (11th Cir. 1987) 7

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 10

Mullane v. Central Hanover B. & T. Co., 339 U.S. 306 (1950) 5, 9

Parratt v. Taylor, 451 U.S. 527 (1981) 4, 5, 6

Perry v. Sindermann, 408 U.S. 593 (1972) 5, 9, 10

Roberts v. Joiner, 590 So.2d 195 (Ala. 1991) 2, 3, 7, 9, 10

TABLE OF AUTHORITIES — (Continued

Federal Constitution and Statutes: *Page*

U.S. Const. Art. VI, cl. 2 1

U.S. Const. amend. I 1, 6, 7

U.S. Const. amend. XIV 1, 4, 11

42 U.S.C. § 1983 . . . . . 1, 11

Ala. Code § 11-43-160 (1975) 1, 10

No. 91-1497

In The

Supreme Court Of The United States

October Term, 1991

JIM JOINER; JOHN MILNER

Petitioners,

v.

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

This case involves U.S. Const. Art. VI cl. 2, U.S. Const. amend. I, U.S. Const. amend. XIV, 42 U.S.C. § 1983 and Ala. Code § 11-43-160. Pertinent portions of these provisions are reprinted in the petition for writ of certiorari at A.58-62.

STATEMENT OF THE CASE

Respondents' assertion that the petitioners' statement of the case "embellishes" the facts, and that petitioners' facts are unsupported by the record, is devoid of merit. If petitioners "embellished" any fact, or stated any unsupported fact, respondents would have cited such fact and rebutted it. They did not.

Petitioners' statement of the case in the petition for writ of certiorari omitted citations to the record below because that type of citation was not used in the sample petition made available to the petitioners by the clerk of this Court.[1] In the Appendix hereto, petitioners have reprinted their original statement of the case, with the relevant citations to the record below. A.1-8.

Respondents list a number of "problems" and imply that those "problems" were reasons for the petitioners' discharge. Resp.Br. 8-9. Mayor Lamar Reid, however, testified at trial that, in his opinion, the respondents cut the petitioners' pay and took away petitioner Joiner's insurance in retaliation for petitioners reporting the improper tire purchases by councilmen Chambers and Keith. (RT 571-578). The Alabama Supreme Court stated that petitioners presented "substantial evidence" that they had been discharged in retaliation for reporting the improper tire purchases. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991). Mayor Reid's testimony also confirmed that the petitioners were not discharged for the purported "problems" cited by respondents in their brief, and that respondents did not notify the petitioners of any specific charges being leveled against petitioners. (RT 531-578; Joint Exhibit 10). Mayor Reid also testified that petitioners were doing a good job as police officers. (RT 493, 545).

---

[1] As used herein, citations to the petition for writ of certiorari are identified as "Pet."; citations to the Appendix to the petition for writ of certiorari are identified as "Pet.A."; citations to the Reporter's Transcript of the trial below are identified as "RT"; and, citations to the respondents' brief in opposition to the petition for writ of certiorari are identified as "Resp.Br.".

Petitioners, in their original statement of the case and in the foregoing paragraphs, have already cited the Court to the following facts: (a) petitioners could be fired only for cause and, therefore, had a property interest in their public employment (RT 47-51, 282-284, 502-502, Joint Exhibit 6, Pet.A.51-51); (b) petitioners were doing a good job as police officers for respondents (RT 493, 545-546); (c) the respondents' retaliation against the petitioners started when petitioners notified Mayor Lamar Reid of the improper tire purchases by two of the councilmen, not when the proposed 1984 budget was cut (RT 68-72, 287, 294-295); (d) respondents discharged petitioners for an impermissible retaliatory purpose (RT 114-115, 577-578) *Roberts,* at 202; (e) prior to the discharge, respondents did not notify petitioners of any specific charges being brought against petitioners, and did not provide petitioners an opportunity to respond to any specified allegations of wrongdoing (RT 129, 145, 147, 165-166, 222, 301, 304-306); and (f) Mayor Lamar Reid made the decision to discharge petitioners before the March 29, 1984 commission meeting, without notifying petitioners of the charges against them or providing them an opportunity to respond (RT 498).

Finally, many of the "facts and issues" cited by respondents in their brief are of the type that they argued unsuccessfully in the trial court: they are merely frivolous attempts to distract this Court from the substantive issues in this case. It didn't work with the jury; it didn't work with the trial judge; and, it shouldn't work here. A good example of this strategy is the respondents' reference to the showing of "x-rated" movies at the city hall. Resp.Br. 3-4. Yet, there is no evidence in the record that "x-rated" movies had anything to do with the firing of the petitioners. In fact, the record shows that neither of the petitioners were even present when the movies were shown. (RT 247-248, 355). Nevertheless, respondents believe it is in their interest to tell this Court that there were "x-rated" movies shown at the town hall while petitioners were employed as police officers for the town. The fact that respondents believe

it to be in their interest to cite such irrelevant facts typifies the poverty of their arguments.

REASONS FOR GRANTING THE WRIT

As set forth herein, and in the petition for writ of certiorari, the Alabama Supreme Court's decision impermissibly restricts the pretermination process due petitioners and all other Alabama tenured public employees under the Fourteenth Amendment. By its decision, the Alabama Supreme Court has authorized the state and its political subdivisions to discharge their tenured employees without first providing them notice of the charges against them and an opportunity to respond to the charges.

I.

CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 U.S. 532 (1985), DID NOT EXPAND OR SUBSTANTIVELY CHANGE THE LAW APPLICABLE TO PETITIONERS' DUE PROCESS CLAIMS, AND *PARRATT V. TAYLOR*, 451 U.S. 527 (1981) WAS NOT LEGAL PRECEDENT WITH RESPECT TO PETITIONERS' DUE PROCESS CLAIMS

As set forth in the petition for writ of certiorari (Pet.13-19), and discussed at item III *infra*, petitioners were tenured public employees who had a property interest in their employment at the time of their discharge on March 29, 1984. The petitioners claim that they were entitled to receive notice of the charges against them, and an opportunity to respond to the charges, prior to being discharged. Contrary to respondents' assertion and the decision of the Alabama Supreme Court, this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) did not expand, or substantively change, the law applicable to the petitioners' due process claims. In *Loudermill*, this Court expressly stated:

> An essential principle of due process is that a deprivation of life, liberty, *or property* "be *preceded* by notice *and* an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). We have described the "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); see *Bell v. Burson*, 402 U.S. 535, 542 (1971). This principle requires "some kind of a hearing" *prior* to the discharge of an employee who has a constitutionally protected interest in his employment. *Board of Regents v. Roth*, 408 U.S., at 569-570; *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (emphasis added). As we pointed out last Term, ***this rule has been settled for some time now.*** *Davis v. Scherer*, 468 U.S. 183, 192 (1984) (emphasis added).

470 U.S. at 542.

Loudermill was an affirmation of long-settled principles of due process, not an expansion of or a departure from those principles, as argued by respondents. The respondents, therefore, err in asserting that *Loudermill* would have to be applied retroactively in order for petitioners to be entitled to receive notice of the charges against them and an opportunity to respond prior to being discharged.

The respondents' also err in asserting that *Parratt v. Taylor*, 451 U.S. 527 (1981) was dispositive of the petitioners' due process claims at the time they were discharged. The due process claim in *Parratt* arose from a prison guard's unintentional loss of a prisoner's $23.50 hobby kit in 1976 or earlier. The due process claim in *Loudermill* arose from the November 3, 1980 summary discharge of a tenured public employee, who was not notified of the charges of dishonesty leveled against him and who was not provided an opportunity to respond to the charges prior to being discharged. The due process claim in the case at bar arose from the March 29, 1984 summary

discharge of petitioners, who were not notified of the charges against them and given an opportunity to respond to the charges prior to being discharged. In addition, the Alabama Supreme Court determined that petitioners established by substantial evidence that they were discharged in retaliation for lawfully exercising their rights of speech under the First Amendment of the U. S. Constitution.

If *Parratt* was dispositive of the petitioners' due process rights at the time they were discharged, then this Court would have applied the same reasoning and result to its determination of the complainant's due process rights in *Loudermill*. This Court, however, distinguished *Loudermill* from *Parratt* due to the dissimilar property interests involved, the differing intent by the government agencies responsible for the property deprivations, and the relative practicalities of providing predeprivation notice and a hearing. For the reasons stated above, and in the petition for writ of certiorari, *Parratt* is equally inapposite to the petitioners' due process claims.

Respondents citation of *Cafeteria and Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886 (1961), is inapposite. Resp.Br. 15. The complainant in that case, Rachel Brawner, was a short order cook employed by a private corporation. *Id.* at 887. Unlike petitioners in the case at bar, Ms. Brawner was not a tenured public employee with a property interest in her job, and she was not discharged in retaliation for lawfully exercising her rights of speech under the First Amendment.

Respondents citation of *Goolsby v. City of Montgomery*, 805 F.2d 1008 (11th Cir. 1986), is also inapposite. Resp.Br. 19, 24. The complainant in that case, Donald Goolsby, was a permanent status sanitation supervisor for the City of Montgomery, Alabama. *Id.* at 1009. Mr. Goolsby was discharged from his position after being convicted of the criminal charge of defrauding the City of Montgomery. *Id.* at 1009-10. Unlike petitioners in the case at bar, Mr. Goolsby was not discharged in retaliation for lawfully exercising his rights of speech under the First Amendment.

Respondents citation of *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987), is also inapposite. Resp.Br. 19, 24. The complainant in that case, Jaxie Lee, was a tenured employee of the Cobb County, Georgia Sheriff's Department. *Id.* Ms. Lee was charged with disseminating criminal records without authorization and discharged. *Id.* Unlike petitioners in the case at bar, Ms. Lee was not discharged in retaliation for lawfully exercising her rights of speech under the First Amendment:

> *In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of employee's constitutionally protected rights*, we must presume that official action was regular and, if erroneous, can best be protected in other ways.

Lee, at 1032 (emphasis added); *citing Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). In the case at bar, the Alabama Supreme Court found "substantial evidence" that the petitioners were discharged for lawfully exercising their rights of speech under the First Amendment. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991).

II.

ASSUMING, *ARGUENDO*, THAT THIS COURT'S DECISION IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 U.S. 532 (1985) CHANGED THE LAW WITH RESPECT TO DUE PROCESS IN THE DISCHARGE OF A TENURED PUBLIC EMPLOYEE, PETITIONERS CITED AND ARGUED *LOUDERMILL* IN THE APPEAL TO THE ALABAMA SUPREME COURT AND, THEREFORE, ARE NOT PRESENTING ARGUMENTS TO THIS COURT THAT WERE NOT MADE TO THE ALABAMA SUPREME COURT

Even assuming, *arguendo*, that retroactive application of *Loudermill* was apposite to the proceedings below, respondents' statement that petitioners "did not present" that argu-

ment to the Alabama Supreme Court is incomplete and misleading. Petitioners specifically cited *Loudermill* on page 28 of their brief on appeal to the Alabama Supreme Court, for the proposition that petitioners were tenured public employees who were entitled to receive notice of the charges against them and a hearing prior to their discharge. Petitioners also argued *Loudermill* at length on pages 14-19 in their application and brief for rehearing to the Alabama Supreme Court. (Pet.11-12, 19-21.)

Respondents citation of *Head v. New Mexico Bd. of Exam. in Optometry*, 374 U.S. 434 (1963), is inapposite. Resp.Br. 20. In that case, the appellants' "free speech" argument was not "set forth in the notice of appeal [in the state courts] or fairly comprised therein. . . ." *Id.* at 432-433 n. 12. As set forth above, and in the petition for writ of certiorari, petitioners specifically cited and argued *Loudermill* to the Alabama Supreme Court.

III.

THE OTHER GROUNDS CITED BY THE RESPONDENTS ARE NOT SUPPORTED BY THE APPLICABLE LAW AND FACTS OF THE ACTION BELOW AND, THEREFORE, THOSE GROUNDS DO NOT SUPPORT THE DECISION OF THE ALABAMA SUPREME COURT

A. *Respondents did not notify petitioners of the charges against them, nor provide them an opportunity to respond to the charges, prior to discharging them.*

The trial testimony of petitioners and Mayor Lamar Reid confirmed that respondents discharged petitioners without first notifying petitioners of any specific charges against them or providing them an opportunity to respond. (RT 129, 145, 147, 165-166, 222, 301, 304-306). The decision of the Alabama Supreme Court further confirms the fact that petitioners did not receive a pretermination hearing, by holding that petition-

ers were entitled to received only a post-termination hearing as provided under state law. *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991).

B. Loudermill *did not "articulate for the first time" the applicable standards of due process, nor were the post-deprivation remedies adequate to provide due process.*

As set forth at item I above, and at length in the petition for writ of certiorari (Pet.19-21), *Loudermill* did not "articulate for the first time" the "essential principle of due process . . . that a deprivation of . . . property `be *preceded by* notice and an opportunity for hearing appropriate to the nature of the case.'" *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added); *see also Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Board of Regents v. Roth*, 408 U.S., at 569-570; *Perry v. Sindermann*, 308 U.S. 593, 599 (1972).

C. *Under the provisions of state and federal law, and the express terms of respondents' written personnel policy, petitioners were tenured public employees who had a property interest in their jobs and were not employees at will.*

Respondents' assertion that petitioners Joiner and Milner were employees at will is an egregious misrepresentation of the law and facts. As set forth at length in the petition for writ of certiorari, petitioners had a property interest in their public employment and, without question, were not employees at will. Pet.13-19.

Both petitioners were nonprobationary, "permanent status" employees, as defined by respondents' personnel policy, who had "*a right to hold [their jobs] permanently*, conditioned upon [their] continued satisfactory performance, honest, loyalty and the Town's ability to finance services. . . . " (emphasis added). Pet.A.51-52. Petitioners could be discharged only "for cause" and, therefore, had a property interest in their continued employment. *Board of Regents of State Colleges v. Roth*, 408

U.S. 564, 569-570, 576-578 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599, 601 (1972); *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

In addition, because petitioner Joiner was the police chief of the Town of Morris, he had an absolute right under Alabama to be discharged only for cause and only *after* being provided a hearing by the council of the Town of Morris. *Ala. Code* § 11-43-160 (1975). Pet.A.62.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).[1] Both petitioners, therefore, had a property interest in their continued public employment and were entitled to receive a pretermination hearing. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570, 576-578 (1972); *Fetner v. City of Roanoke*, 813 F.2d 1183, 1185-86 n.7 (11th Cir. 1987); *City of Huntsville v. Biles*, 489 So.2d 509, 511-512 (Ala. 1986).

IV.

THE DECISION OF THE ALABAMA SUPREME COURT ADVERSELY IMPACTS ALL ALABAMA TENURED PUBLIC EMPLOYEES BECAUSE IT AUTHORIZES THE STATE OF ALABAMA AND ITS POLITICAL SUBDIVISIONS TO DISCHARGE TENURED EMPLOYEES WITHOUT FIRST PROVIDING THEM NOTICE OF THE CHARGES AGAINST THEM AND AN OPPORTUNITY TO RESPOND TO THE CHARGES

For the thousands of tenured public employees throughout the state of Alabama, the decision in *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991) is certainly not "narrow" in its application, as stated by the Alabama Supreme Court. *Id.* at 201. *Roberts* has

---

[1] On March 2, 1984 the Alabama Supreme Court held that a city's police chief "... could be discharged only *after* a 'for cause' hearing by the City Council, as provided by § 11-43-160." *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984) (emphasis added). The court decided *Godwin* almost a month prior to the time that the Town of Morris discharged the petitioners without provided them a pretermination hearing.

not been overruled or distinguished in any subsequent decisions by the Alabama Supreme Court. Under *Roberts*, the tenured employees of Alabama's state and local governments are now subject to state-sanctioned deprivation of their rights of due process under the Fourteenth Amendment and their remedies under 42 U.S.C. § 1983.

CONCLUSION

For the reasons set forth above, and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

G. DANIEL EVANS
Counsel of Record
1736 Oxmoor Road
Suite 101
Birmingham, Alabama 35209
205/870-1970

GARY P. CODY
MICHAEL J. EVANS
Longshore, Evans & Longshore
1900 City Federal Building
2026 Second Avenue North
Birmingham, Alabama 35203
205/252-7661

Attorneys for Petitioners

APPENDIX

Petitioners' Statement of the Case, From the Petition for Writ of Certiorari, With the Addition of Citations to the Record Below

---

STATEMENT OF THE CASE

This case provides the Court with the important opportunity of prohibiting the state from taking the petitioners' vested public employment as police officers without first providing them notice of the charges against them and a hearing on the charges. This case further provides the Court with the opportunity to set right an egregious wrong by restoring to petitioner Milner, a 53 year-old combat veteran, his career as a police officer, which he will otherwise lose forever.[1] And, finally, this case provides the Court with the important and broader opportunity of protecting all of the public employees in Alabama from having their jobs taken by the state without first being provided notice of charges and a hearing on the charges. The Court can accomplish these ends by reversing the decision of the Alabama Supreme Court, which diametrically conflicts with this Court's longstanding decisions holding that a state is required to provide a tenured public employee with notice of charges being brought against him and a hearing on those charges before the state takes his job.

---

[1] Due to his termination by the Town of Morris petitioner Milner was unable to obtain work as a police officer with other municipalities. After Milner began his career as a police officer, the State of Alabama enacted legislation prohibiting the hiring of police officers who have not successfully completed a course of training at Alabama's police academy. Police officers who were employed at the time the statute was enacted were "grandfathered" under the act and were permitted to continue their employment. Because Milner is 53 years old, he is prohibited from enrolling in the State of Alabama's police academy. If this Court rules that petitioner Milner was entitled to receive a pretermination hearing, then under the trial court's order Milner will be reinstated to his former position as police sergeant with the Town of Morris. As an active, employed police officer he will then be eligible for employment as a police officer throughout the State of Alabama, without having to complete the state's police certification course.

Petitioner Joiner was hired as police chief of the Town of Morris on August 10, 1978. (RT 42). Under Alabama law, Joiner could be discharged only for cause and only after being provided a hearing by the Town's council.[2]

Petitioner John Milner was hired by the Town as a police sergeant in 1982. (RT 282-283). Milner was hired under the Town's written personnel policy, which is reprinted at A.39-50.[3] The personnel policy stated that new employees would serve a six-month probationary period. A.51. Under the personnel policy, employees attained "permanent employee" status after satisfactorily serving the probationary period. A.51-52. Permanent employees could be fired only for cause. The personnel policy provided a permanent employee with the "right to hold [his or her] job permanently, conditioned upon [his or her] continued satisfactory performance, honesty, loyalty, and the Town's ability to finance services. . . . " A.51-52. Milner successfully completed his probationary period and attained "permanent employee" status, whereupon he was promoted from patrolman to sergeant. (RT 284).

In October of 1983 the Town clerk showed petitioner Milner several invoices from the Goodyear tire store in Birmingham, Alabama.[4] (RT 63, 286-287). Those invoices showed that council members Earl Peyton and Frank Keith, as well as

---

[2] *See Ala. Code* § 11-43-160 (1975). A.61.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).

[3] The correct Appendix number for the Town's written personnel policy is A.45-56, rather than A.39-50 as shown in the Petition for Writ of Certiorari.

[4] Photocopies of the five tire invoices were attached as Exhibit A to the petitioners' original complaint. The five photocopies were identified as plaintiffs' (petitioners') exhibits one through five at trial, and were admitted into evidence. The petitioners did not have the original tire invoices, and their photocopies of the invoices were of very poor quality. Due to the poor quality of the photocopies, they were not able to be adequately reproduced and reprinted for inclusion in the Appendix hereto. Based upon the testimony at trial, the photocopies of the five tire invoices established that council members Peyton and Keith, and Keith's son, Bobby, had purchased tires through the Town's account for their personal use. (RT 64-66, 86-91, 286-287).

Keith's son, had purchased tires for their personal vehicles under the guise of buying tires for the Town of Morris. By purchasing the tires in the name of the Town, they were able to buy the tires at the substantially discounted price that was available to state and local governmental agencies through the state bid law. A.1-2. By purchasing the tires in the name of the Town, Peyton and the Keiths were also able to avoid paying state and federal taxes on the tires. (RT 69). The net result was that council members Peyton and Keith, as well as Keith's son, Bobby, were able to buy their $170.00 tires for approximately $40.00. (RT 68-69).

Petitioner Milner asked the Town clerk to make copies of the tire invoices, which he then turned over to his immediate supervisor, petitioner Joiner. (RT 287). Joiner took the tire invoices and reported the matter to the mayor, Lamar Reid. A.1-2. (RT 68, 287). Mayor Reid indicated to Joiner that he planned to ask Peyton and Keith to resign from the council. (RT 70-72).

A private meeting of the Town council was held on December 18, 1983 to resolve the tire issue. (RT 101-102). At that meeting it was agreed that council members Peyton and Keith would resign from the committee that purchased goods for the Town, and that they would pay the difference between the price that they actually paid for the tires and the price that they would have paid if they had not bought the tires in the name of the Town. A.2, 33. (RT 101-102).

Following the December 18, 1983 private meeting of the Town council, the mayor called Milner in and told him that the tire matter was over. (RT 294). Later that day, however, council member Keith told Milner that the tire matter was not over, that he was not through with Milner and that things were going to be a lot different regarding the police department. (RT 294-295). Keith said that he planned to take a much larger hand in running the police department than he ever had before. A.27. (RT 294-295).

A few minutes after Keith delivered his warning to Milner, council member Peyton came to Milner and said that the situ-

ation caused by the tire matter was not resolved, regardless of what the mayor had told Milner. (RT 295). Peyton also said that he was going to "get" Joiner and Milner. A.27. (RT 295).

Shortly before January 1, 1984, council member Keith ordered Joiner to find a reason to terminate petitioner Milner. (RT 109). Joiner refused, saying that Milner had not violated the personnel policy nor committed any wrongdoing that would justify terminating him. A.2. (RT 110).

At the next meeting of the Town council on January 10, 1984, Keith made a motion to cut the pay of the Town's full-time employees by five percent. A.2, 35. (RT 111-113). The Town's only full-time employees were petitioners Joiner and Milner, police officer Frankie Witt and the Town clerk, Anna Grooms. A.2. (RT 112). Anna Grooms was the person who originally brought the improper tire purchases to the attention of petitioner Milner. A.2. (RT 286-287). The Town also had part-time employees, but Keith did not seek to cut their pay. A.35. (RT 111-112). Council members Keith, Peyton, Reno and Chambers voted in favor of the pay cut. A.35. Mayor Reid voted against the pay cut. A.35. Petitioners Joiner and Milner were given no notice prior to the meeting that the council would consider a pay cut. (RT 117).

The reason given by the council for the pay cuts at the January 10, 1984 meeting was the Town's purported poor financial condition. A.2. (RT 522-523). Mayor Reid later admitted, however, that the Town was in good financial condition at the time the petitioners' pay was cut. (RT 529, 575). Joiner later informed the council that he thought the pay had been cut because he and Milner had reported the improper tire purchases. A.2. (RT 200). Mayor Reid testified at trial that he believed that Joiner's and Milner's pay was cut in retaliation for their speaking out about the tire purchases. (RT 577-578).

At a council meeting on February 28, 1984, the council decided that the Town should not be paying the health insurance premiums on Joiner's family. A.2-3, 38-39. Prior to the meeting Joiner was given no notice that the council would be

considering whether to pay the insurance premiums. Joiner let the council know that he believed the action had been taken in retaliation for his reporting of the improper tire purchases. A.2-3.

At its meeting on March 13, 1984, the Town council adopted a resolution stating that there was "a problem" existing between the council and the police department. A.3. The resolution stated that the council would allow two weeks to find a solution to "the problems" and then, if no solution was found, the council would "bring its own solution to the table." A.3. The mayor said that the council was publicly recognizing that there was a "problem" between the Town council and the police department, and that the council was willing to meet with the police department during the next two weeks to see if the "problems" could be resolved. A.3. (RT 122-123). Petitioner Milner asked the mayor to explain the resolution, but neither the mayor nor the members of the council would explain what "problem" they were referring to in the resolution. (RT 327-328).

On March 15, 1984, petitioners Joiner and Milner met informally with the mayor and members of the council. A.3. (RT 300-301). Joiner asked for the pay cut to be rescinded. A.3. (RT 129). He also requested that the Town reinstate the health insurance for his family. A.3. (RT 129). The mayor and members of the council did not agree to these requests. A.3. (RT 129).

On March 23, 1984 the complaint initiating this action was filed. A.3. The complaint, with Exhibits B through D, is reprinted at A.26-39.[5] The complaint alleged that Joiner's and Milner's pay had been cut and that Joiner's family health insurance had been terminated in retaliation for reporting the improper tire purchases to the mayor. A.30. The complaint alleged that the actions of the defendants deprived Joiner and

---

[5] See n.4 *supra* regarding the explanation for omission from Appendix of Exhibit A to the petitioners' original complaint.

Milner of their property without due process of law and infringed upon Joiner's and Milner's right to free speech under the First Amendment to the Constitution of the United States. A.30. The complaint also asserted causes of action under state law. A.30-31.

The next regularly scheduled meeting of the Town council was held on March 27, 1984. (RT 136). At that meeting the council chamber was full of residents of the Town who were there to express their support for the police officers. (RT 137). Instead of discussing the purported police "problems" in the presence of the residents, the council voted to have a closed meeting immediately following the regularly scheduled meeting. (Joint Exhibit 11). (RT 139). The minutes of the closed meeting reflect that the Town's attorney recommended that the council try to find out how the residents of the Town felt about the matter. (Joint Exhibit 11). The Town's attorney also recommended that petitioners Joiner and Milner be suspended with pay for thirty days. (Joint Exhibit 11). No official action was taken. (Joint Exhibit 11).

Two days later, on March 29, 1984, the plaintiffs were fired at a specially called council meeting. A.4, 40. None of the council members notified petitioners Joiner and Milner of the specially called council meeting. Joiner learned of the meeting when he saw Anna Grooms, the Town clerk, crying at Town Hall on March 29. (RT 141-142). Joiner asked Ms. Grooms why she was crying, whereupon she told him that there was a council meeting that night and that the council was going to fire him. (RT 142). Milner learned about the council meeting when Joiner telephoned him and told him what he had learned from Anna Grooms. (RT 306). The phone call from Joiner was the only notification to Milner that there was going to be a specially called council meeting on the night of March 29, 1984. (RT 306).

When Joiner arrived at the council chamber on the night of the 29th he noticed that it was filled with relatives of the council members. (RT 143-144). When the meeting started, the

mayor read a statement saying that the unspecified "problems" were still existing with the police department, but he did not say what the "problems" were. A.4. (RT 145). The mayor then said he would like to give Joiner and Milner an opportunity to resign. A.4. (RT 146). After the mayor had read the statement, Joiner told the mayor that he would like to know what the charges against him were. (RT 146-147). The mayor's response was "Well, there aren't any really." (RT 147). Joiner then said that he had done nothing wrong and would not resign. A.4. (RT 147). The council then allowed comments from residents and relatives of council members Keith and Peyton.[6] (RT 147-148). The mayor and members of the council then voted to fire petitioners Joiner and Milner, effective immediately. A.4, 40. (RT 148). Council members Keith and Peyton, who had purchased tires through the Town's account, participated in all of the meetings and in all of the discussions leading up to the council's vote to fire Joiner and Milner, but abstained from the actual vote to fire Joiner and Milner. A.4. (RT 147-148). Mayor Reid testified at trial that he had decided to fire the petitioners sometime prior to the March 29th council meeting. (RT 498).

On April 27, 1984, the petitioners filed their Supplemental Complaint, alleging that they had been discharged by the Town in retaliation for their statements concerning the improper tire purchases by council members Peyton and Keith. The Supplemental Complaint is reprinted at A.40-41. The Supplemental Complaint alleged that the discharge was in violation of petitioners' rights under the First Amendment of the Federal Constitution. A.40.

On December 5, 1984, the petitioners filed their Amended Complaint, alleging that they were "permanent employees" of, and had employment contracts with, the Town of Morris under the Town's personnel policy. A.42, 51-52. The petitioners also alleged, among other things, that the Town's failure to

---

[6]Council members Peyton and Keith had made the improper tire purchases.

provide them notice and a hearing prior to being discharged was a violation of their rights of due process under the Fourteenth Amendment of the Federal Constitution, and that the violation gave rise to a cause of action under 42 U.S.C. § 1983. A.42-43. The Amended Complaint is reprinted at A.42-44. The Town's Personnel Policy is reprinted at A.45-56.

At trial, petitioners dismissed their state law claims and proceeded only on their claims under 42 U.S.C. § 1983. A.4. In addition to petitioners' claims under the First Amendment, the trial court submitted the petitioners' Fourteenth Amendment claims to the jury on three theories: (1) that the pay cut was a deprivation of property without due process of law; (2) that the refusal to pay Joiner's family health insurance premiums was a deprivation of property without due process of law; and (3) that petitioners' employment was terminated without due process of law. A.4, 20-25. The due process claims were based upon the Town's failure to provide petitioners with notice of charges and a hearing on those charges before cutting petitioners' pay, eliminating Joiner's family health insurance, and terminating petitioners' employment. A.20-22. The jury returned a general verdict in favor of petitioners, awarding them each $100,000. A.1, 23. The trial court awarded Joiner an additional $25,430 for lost wages and insurance premiums, and Milner an additional $39,034 for lost wages. A.1, 23. The trial court also order the Town to reinstate petitioner Milner. A.1, 23.[7]

[7] Petitioner Joiner dismissed his claim for reinstatement as police chief of the Town of Morris due to a work-related injury he suffered on another job after being terminated by the Town. As a result of the injury, Mr. Joiner became totally and permanently disabled.